

THE
MEE

MULTISTATE ESSAY EXAMINATION

2007 MEE

Questions and Analyses



2007 MEE Questions and Analyses

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Preface

This publication includes the questions and analyses from the February 2007 and July 2007 Multistate Essay Examinations. Each test now includes nine questions; most jurisdictions that use the MEE select six questions for their applicants to answer. (The February 2007 MEE was the last with seven questions.) For more information, see the *MEE Information Booklet* available at www.ncbex.org.

The model analyses to the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination. These models are not an official grading guide. Some jurisdictions grade the MEE on the basis of state law, and jurisdictions are free to modify the analyses as they wish, including the suggested weights given to particular points. Grading of the MEE is the exclusive responsibility of the jurisdiction using the MEE as part of its admissions process.

The topic or topics covered by each question are listed on the first page of its accompanying analysis, followed by Roman numerals which refer to the MEE subject matter outline for that topic. For example, Question 3 on the February 2007 MEE tested Federal Civil Procedure IV.D., Discovery. Subject matter outlines are included in the *MEE Information Booklet* which can be found on the NCBE website at www.ncbex.org.

Description of the MEE

The MEE is a series of essay questions, any of which a jurisdiction may select to include as a part of its bar examination. Applicants are expected to spend approximately thirty minutes answering each MEE question administered. The areas of law that were covered by the questions in the February 2007 MEE were: Agency and Partnership, Negotiable Instruments (Commercial Paper), Conflict of Laws, Corporations and Limited Liability Companies, Decedents' Estates, Family Law, Federal Civil Procedure, Sales, Secured Transactions, and Trusts and Future Interests. For the July 2007 MEE and later MEEs, the areas of law covered include Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Conflict of Laws, Constitutional Law,* Contracts,* Criminal Law and Procedure,* Evidence,* Family Law, Federal Civil Procedure, Real Property,* Torts,* Trusts and Estates (Decedents' Estates; Trusts and Future Interests) and Uniform Commercial Code (Negotiable Instruments (Commercial Paper); Secured Transactions). Some questions may include issues in more than one area of law.

The purpose of the MEE is to test the applicant's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the applicant to demonstrate an ability to communicate effectively in writing.

*new topics

Instructions

The back cover of each test form contains the following instructions:

Do not break the seal on this booklet until you are told to begin.

You will have thirty minutes in which to write each of your answers to the MEE questions you are to answer. There will be no break once the formal testing session begins. You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise, simply draw a line through the material you wish to delete.

Read each fact situation very carefully and do not assume facts which are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show: an understanding of the facts; a recognition of the issues included; the applicable principles of law; and the reasoning by which you arrive at your conclusion. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

Some jurisdictions instruct applicants to answer MEE questions according to the law of the jurisdiction. Absent such an instruction, you should answer the questions by applying fundamental legal principles rather than local case or local statutory law.

February 2007
Questions

MEE Question 1

Uncle owns a chain of sandwich shops. Nephew has worked for Uncle for several years, first as a line cook in various sandwich shops and then as a sandwich shop manager. Uncle recently sold Nephew the sandwich shop that Nephew had been managing.

Nephew paid for the shop with \$10,000 cash and a \$10,000 negotiable demand note made payable to the order of Uncle. Nephew signed the note as a maker. To show her faith in her son, Nephew's mother, Mom, signed the note with the words "Mom, as guarantor." Her signature appears on the front of the note, immediately below Nephew's signature and under the additional word "Guaranteed."

The note provided that all parties to it waived presentment and notice of dishonor. When they signed the note, Uncle, Nephew, and Mom orally agreed that Uncle would not seek payment of the note until the shop was making a good profit and that he would negotiate the note only with Nephew's and Mom's consent.

Three months after the note was signed and before any payment had been made, Uncle indorsed the note and sold it to Acme Finance Co. for \$9,000 cash. Uncle did not obtain Nephew's or Mom's consent to this sale. Acme had no knowledge of the oral agreement among Uncle, Nephew, and Mom.

When Acme sought payment from Nephew, Nephew persuaded Acme that any effort to collect full payment from him would be futile. Acme therefore gave Nephew a written release from his obligations under the note in exchange for a payment of \$1,000.

Acme has sued Mom for payment of the \$9,000 still due on the note.

What rights, if any, does Acme have against Mom under Article 3 of the Uniform Commercial Code? Explain.

MEE Question 2

Testator died three years ago. His duly probated will provided that:

1. I give \$100,000 to Trustee to hold in trust and to distribute the trust income equally among those persons who are my friends at my death. After 10 years, the trust shall terminate and the trust property shall be distributed equally between my son, Sam, and the Fine Arts Program at State University. In no event shall this trust terminate earlier than 10 years after my death.
2. I give the rest of my estate to my daughter, Donna.

Both Sam and Donna survived Testator.

Walter and Janice, two neighbors of Testator, correctly claim they were good friends of Testator at the time of his death and demand that Trustee pay the income from the \$100,000 trust to them. Claimant, who has a tort judgment against Sam, demands that Trustee immediately pay Claimant \$25,000 from the trust to satisfy the judgment.

Two years after Testator died, State University closed as a result of a state budget crunch and the legislature's determination that the programs at State University, including its fine arts program, were largely duplicative of the programs at State Polytech, the other public university in the state.

1. To whom should the income from the \$100,000 trust be distributed? Explain.
2. Should Trustee immediately pay \$25,000 from the trust to Claimant? Explain.
3. To whom should Trustee pay the trust principal at the end of the 10-year period? Explain.

MEE Question 3

Transit Authority, Inc. (Transit Authority) operates a bus system in Big City. Last month, a Transit Authority bus collided with a passenger car driven by Tourist. The accident occurred when Tourist suddenly veered into the bus operator's lane at a major intersection. The bus operator was unable to stop the bus in time to avoid the collision, and Tourist was injured. Immediately after the accident occurred, the bus operator telephoned his supervisor to report the accident. Then, following Transit Authority's standard procedures, the bus operator completed an "Operator's Report of Accident" form. The completed form included the date, time, and place of the accident, the road conditions, the names of witnesses, a brief description of how the accident occurred, and a description of the personal injuries and property damage caused by the accident.

When a Transit Authority supervisor arrived twenty minutes after the accident occurred, she took a statement from the bus operator and recorded that statement on a "Supervisor's Investigative Report" form. Then she interviewed Tourist and recorded Tourist's statement on the "Supervisor's Investigative Report" form. The supervisor noted all witnesses' names, addresses, and telephone numbers in her report. She took photographs of the accident scene, including the position of each vehicle. Finally, she drew a diagram of the scene on the last page of the "Supervisor's Investigative Report" form.

Tourist has filed a personal injury action against Transit Authority in federal court, properly invoking the court's diversity jurisdiction. Tourist alleges that the bus operator, Transit Authority's employee, was driving negligently. She further alleges personal injury and property damage in a total amount exceeding \$200,000. Transit Authority has filed an answer denying the claim of negligence and asserting contributory negligence.

Tourist served two requests for production of documents on Transit Authority. One request was for "any and all accident reports, diagrams, photographs, and any other documents which relate in any way to the collision between the bus and the car." A second request was for the bus operator's "entire personnel file that is maintained by Transit Authority, including disciplinary actions, safety records, and driving records." Transit Authority has refused to produce the accident reports that the operator and the supervisor created on the grounds that the reports were "prepared in anticipation of litigation." In addition, Transit Authority refuses to produce the bus operator's personnel file because the information that it contains "is not relevant."

Tourist has made a motion to compel production of the accident reports and the bus operator's "entire personnel file."

Should Tourist's motion be granted in whole or in part? Explain.

MEE Question 4

Twelve years ago, Husband and Wife married in State A. Their marriage appeared to be happy and stable. However, one year ago, without warning, Husband left Wife and moved to State B, 500 miles away. Husband obtained a new job in State B and rented an apartment there. He has told Wife that he never intends to return to State A.

Last week, Wife was personally served in State A with a copy of Husband's State B divorce petition. The petition requests the State B court to grant a divorce on grounds of a six-month separation and irreconcilable differences. The petition also requests the State B court to award Husband the following assets, all of which are titled solely in Husband's name:

1. The marital home in State A, which Husband purchased five years before the marriage. During the marriage, Husband made mortgage payments on the home with his employment income.
2. Stock, which Husband inherited from his grandmother during the marriage.
3. Bonds, which Husband purchased with his employment income during the marriage.

All of these assets appreciated significantly in value during the marriage. Wife has no assets titled in her name alone or held jointly with Husband.

Wife is determined to fight this divorce. She has never visited State B, knows no one there, and does not believe she should have to defend a divorce action there. At the same time, she wishes to save her marriage. She has called Husband several times urging him to return to State A and enter marriage counseling, but he has refused. Wife is convinced that Husband is going through a "midlife crisis" and would "return to his senses" with proper counseling and support. She believes she can get him that support and counseling if he returns to State A. Finally, if there must be a divorce, Wife believes that she should receive a share of the assets owned by Husband.

1. Does the State B court have jurisdiction to grant Husband a divorce and award Husband property acquired during the marriage? Explain.
2. Can Wife prevent Husband from obtaining a divorce on the grounds that she does not consent to the divorce and that the marriage might yet be saved? Explain.
3. Without regard to any jurisdictional issues, would Wife, in the event of a divorce, be entitled to a share of any of Husband's assets? Explain.

MEE Question 5

In 2000, Testator executed a valid will. The will provided:

1. I give my 100 shares of stock in XYZ Company to Brother.
2. I give \$3,000 to Sister.
3. I give \$5,000 to Uncle.
4. I give \$10,000 to Cousin.
5. I give the residue of my estate to my alma mater, Polytech.

In 2001, XYZ Company issued its annual dividend in stock. For each 100 shares held, the dividend was 6 shares of XYZ stock.

In 2002, Testator gave \$5,000 to Uncle on Uncle's birthday.

In 2005, Testator died, survived by Brother, Sister, Uncle, and Cousin. Testator's estate consists of the following assets: 106 shares of XYZ Company stock (worth \$1 per share) and \$9,000. Sister made a valid disclaimer of her interest in Testator's estate.

How should Testator's estate be distributed? Explain.

MEE Question 6

Astoria Limited Partnership (Astoria) is a properly formed limited partnership. The general partner of Astoria is Baker, an individual. The limited partners are Tim, Uma, and Vivian, who are also individuals. Under the limited partnership agreement, distributions and voting rights in the limited partnership are allocated to Baker (10%), Tim (30%), Uma (30%), and Vivian (30%).

The limited partnership agreement of Astoria gives the limited partners the right to remove Baker as the general partner—with or without cause—if the holders of 60% of the voting rights concur.

Three weeks ago, articles appeared in the business press raising questions about Baker's management of Caldonia Limited Partnership (Caldonia). While the articles did not specifically mention Astoria, the misconduct documented in the articles—contracts between Caldonia and a janitorial company owned by Baker that charged greatly inflated fees for its services—raised concerns on the part of Astoria's limited partners. Tim wrote Baker requesting that Baker, in his capacity as the general partner of Astoria, provide: (1) copies of any contracts between Astoria and any entities related to or controlled by Baker, (2) copies of any contracts for janitorial services between Astoria and any entity, (3) copies of Astoria's federal and state tax returns for the past three years, and (4) copies of all correspondence between Astoria and any other parties for the past five years. Alternatively, Tim requested access to Astoria's records in order to secure copies of the documents himself.

Baker responded by refusing all four of Tim's requests. Thereupon, Tim contacted Uma and Vivian to request their votes that Baker be removed as the general partner. Tim also proposed that the three limited partners, Tim, Uma, and Vivian, agree in writing to jointly run Astoria until a suitable replacement for Baker could be found.

1. Did Baker act wrongfully in refusing to provide Tim the information and documents he requested? Explain.
2. If the limited partners do no more than remove Baker as general partner of Astoria, will they be liable to persons who transact business with Astoria? Explain.
3. If the limited partners remove Baker and run Astoria until a replacement general partner can be found, under what circumstances will they be liable to persons who transact business with Astoria? Explain.

MEE Question 7

Nine months ago, Feagle Construction Company, Inc. (Feagle), which does business under the trade name of On Top Roofing, obtained a \$150,000 loan from National Bank. As part of the loan transaction, Feagle granted National Bank a security interest in “all rights to payment owed to Feagle Construction Company, Inc. by Hotel Corporation for the roofing construction project on its Broadway Street Hotel.” The Broadway Street Hotel roofing project was by far the largest of Feagle’s fifteen roofing projects and represented its largest account receivable.

National Bank promptly filed a financing statement with this same collateral description, using the trade name of On Top Roofing for the debtor. The financing statement was filed in the appropriate location, and indexed only in the name of On Top Roofing.

Three months after these events, Feagle needed additional monies. It approached State Bank for a loan of \$100,000. State Bank conducted a search of the filing office’s records for financing statements relating to “Feagle Construction Company, Inc.,” but its search did not retrieve National Bank’s financing statement. Accordingly, State Bank granted the \$100,000 loan and obtained a written agreement from Feagle granting State Bank a security interest in “all Feagle Construction Company, Inc.’s accounts, whether now owned or hereafter acquired.” State Bank filed a financing statement in the appropriate location in the name of “Feagle Construction Company, Inc.” as debtor.

Another six months later, mounting financial stress forced Feagle to default on its loans to both National Bank and State Bank. Feagle has about \$75,000 worth of outstanding accounts receivable. In particular, Hotel Corporation still owes Feagle \$50,000 for the hotel roofing project. In addition, Feagle is owed about \$25,000 on a total of ten other roofing projects it has recently completed. Both National Bank and State Bank are seeking to recover some of what Feagle owes them by collecting from Hotel Corporation the amount it still owes Feagle.

Does National Bank or State Bank have first priority in the money owed to Feagle by Hotel Corporation? Explain.

February 2007
Analyses

NEGOTIABLE INSTRUMENTS IV.A., D.; V.J.; VII.B., D.

ANALYSIS

- Legal Problems:
- (1) To what extent is a “guarantor” of a note liable to the holder of the note?
 - (2) Is Acme’s claim against Mom subject to the defense that Uncle negotiated the note contrary to his agreement and without authorization?
 - (3) May Mom raise a defense against Acme based on Acme’s discharge of Nephew, the principal obligor on the instrument?

DISCUSSION

Summary

Acme can recover the \$9,000 still due on the note from Mom. Although Mom has a defense against payment based on Uncle’s violation of his promise not to negotiate the note without Nephew’s and Mom’s consent, this defense is not good against Acme because Acme is a holder in due course. A holder in due course can enforce the note free of any personal defense of this sort. *See* UCC § 3-305(b).

Even though Acme discharged Nephew, Mom’s liability is intact. Mom signed as a guarantor or “accommodation party.” An accommodation party remains liable on a note, even if the creditor discharges the primary obligor. *See* UCC § 3-605. Mom’s liability is of course reduced by the amount paid on the debt by Nephew. *See* UCC § 3-419(e).

Point One (35–45%)

Mom signed the note in the capacity of a maker of the note and is liable to Acme in that capacity, even though she signed for accommodation only, unless she has a valid defense.

Mom signed the front of the note, immediately under Nephew’s signature, and under the word “guaranteed.” She also clearly indicated that she was signing as “a guarantor.” Moreover, it is clear, in UCC terms, that Mom signed the note only for the purpose of incurring liability on it; she was not a direct beneficiary of the value given for the note, as Nephew, not Mom, received an interest in the sandwich shop. Thus, Mom signed the instrument “for accommodation,” *see* UCC § 3-419(a), and the language she used (“as guarantor” and “guaranteed”) gave notice that she had signed only for accommodation, *see* UCC § 3-419(c).

An accommodation party is “obliged to pay the instrument in the capacity in which the accommodation party signs.” UCC § 3-419(b). Mom signed on the front of the note as a person undertaking

to pay and thus signed in the capacity of a maker. UCC § 3-103(a)(7). As a maker, she would be obliged to pay the instrument to a holder. UCC § 3-412. Moreover, this obligation to pay arises even if the person seeking to enforce the instrument has notice of the party's accommodation status. UCC § 3-419(c). Thus, unless Mom has some other valid defense to payment (*see* Points Two and Three, below), the fact that she signed for accommodation will not relieve her of her obligation to pay the instrument according to its terms to a person entitled to enforce it.

Acme is a holder of the note because Uncle indorsed the note to Acme, which took possession of it. *See* UCC § 1-201(20) (definition of holder). As a holder, Acme has a right to enforce the note against any party who signed it. *See* UCC §§ 3-301 (right of party to enforce an instrument), 3-401(a) (effect of signature). Thus, Mom has an obligation to pay Acme unless Mom can assert a valid defense to payment that is good against Acme.

[NOTE: The analysis and result are unchanged under the 2003 Revisions to Article 3-419. *See* Revised Article 3, § 3-419(e).]

Point Two (30–40%)

Acme is not subject to Mom's defense of unauthorized negotiation. Acme had no notice of the oral agreement among Uncle, Nephew, and Mom regarding a limitation on Uncle's power to negotiate the note. Acme gave value for the note in good faith. Thus, Acme is a holder in due course and can enforce the note against Mom free of any defense she could have asserted against Uncle.

Mom has a defense based on Uncle's breach of his agreement not to enforce or negotiate the note. *See* UCC § 3-117 (separate agreement modifying an obligation in a note can provide a defense to payment). The problem for Mom is that Acme appears to be a holder in due course of the note. Acme gave value for the note, taking it in good faith (from all that appears in the facts). The agreement restricting Uncle's right to negotiate the note does not appear on the face of the note, and Acme had no notice of that oral agreement. So Acme gave value in good faith and without notice of any defenses to the note. It is therefore a holder in due course. As a holder in due course, Acme took the note free of ordinary defenses, including Mom's defense of unauthorized negotiation. *See* UCC §§ 3-302(a) (requisites of holder in due course status), 3-305(b) (defenses applicable to a holder in due course).

[NOTE: The analysis is unchanged under Revised Article 3.]

Point Three (20–30%)

Mom's liability on the note was not discharged by Acme's release of Nephew's liability.

As an accommodation party, Mom is liable to Acme if Nephew does not pay the full amount of the note, and this liability survives even if Acme discharges Nephew. Section 3-605(b) of the UCC expressly provides that an intentional voluntary discharge of the principal obligor by a person entitled to enforce a note "does not discharge the obligation of an . . . accommodation party" Mom has a right of recourse against Nephew, and she can seek reimbursement from Nephew to the extent she pays on the note. *See* UCC § 3-419(e). Mom is, of course, only liable to Acme for \$9,000, the amount of the note that remains unpaid.

[NOTE: Revised Article 3 includes significant changes to § 3-605. Those changes would dramatically alter the analysis and result on this issue. This note details the revised analysis.

Because Mom is an accommodation party, she qualifies as a “secondary obligor” on the instrument signed by Nephew. UCC Revised § 3-103(a)(17). As a secondary obligor, Mom has the defenses set out in Revised § 3-605. In particular, when, as here, a person entitled to enforce the instrument releases the obligation of the principal obligor to pay the instrument, then “the secondary obligor is discharged to the same extent as the principal obligor from any unperformed portion of its obligation on the instrument.” UCC Revised § 3-605(a)(2). The person entitled to enforce the instrument could retain rights against the secondary obligor by so specifying in the release, but absent such an explicit retention of rights, the secondary obligor is discharged.

Thus, when Acme accepted \$1,000 and released Nephew from his obligation to pay the remaining amount due on the note, Mom was discharged. There is nothing in the facts to indicate that Acme expressly retained its rights against Mom.]

TRUSTS AND FUTURE INTERESTS I.B.2.; II.A., B.

ANALYSIS

- Legal Problems:
- (1) Does Testator's gift of trust income to friends fail for lack of definite beneficiaries?
 - (2) Does Claimant, as a judgment creditor of Sam, have a right to immediate payment of \$25,000 from the trust?
 - (3) Should the gift to State University fail because State University ceased to exist shortly after Testator's death, or should it be paid to another charity?

DISCUSSION

Summary

The trust's income should be paid to Donna, the residuary legatee under Testator's will, because the gift of the income fails for want of definite beneficiaries. As to the principal, nothing should be paid to Claimant before the trust terminates because Claimant's rights cannot exceed those of Sam, the trust beneficiary, and Sam only has a right to receive trust principal after 10 years. When the trust terminates, one half of the corpus should pass to Sam and the other half, in all likelihood, to State Polytech, as a result of the probate court's exercise of its *cy pres* power.

Point One (35–45%)

Trustee should pay the trust income to Donna, the residuary taker, because the gift of income to Testator's friends fails for want of definite beneficiaries.

It is a well-established trust law principle that a private express trust must have definite beneficiaries. *See* UNIF. TRUST CODE (UTC) § 402(a)(3). The term "friends" is indefinite because it is impossible to determine the precise number of persons who fit this description. *Clark v. Campbell*, 133 A. 166 (N.H. 1926) (a leading case invalidating a trust where the trustee had the discretion to select among friends). Although the modern trend would allow a trustee to select a beneficiary from an indefinite class (*see* UTC § 402(c)), this liberalized position does not apply if the trustee must distribute equally to all members of an indefinite class. *See* WILLIAM M. MCGOVERN JR. & SHELDON F. KURTZ, *WILLS, TRUSTS, AND ESTATES* at 377–79 (3d ed. 2004). Here the trust instrument requires Trustee to distribute income equally among all of Testator's friends. Thus, the income portion of the trust fails for want of definite beneficiaries. The fact that Walter and Janice may have been friends of Testator's does not entitle them to any distribution because the income must be distributed equally among all of Testator's friends.

Where an attempt to create a trust fails, the trustee holds a resulting trust for the settlor or the settlor's successors in interest. *See* RESTATEMENT (THIRD) OF TRUSTS § 8. Where a testamentary trust, as here, fails, the residuary legatee succeeds to the property interest. *See id.* Donna, the residuary legatee under Testator's will, would be Testator's successor-in-interest of the resulting trust. Accordingly, Trustee should pay over trust income to Donna during the trust term.

It could be argued that the income for the first 10 years either should be accumulated for ultimate distribution to the remainder beneficiaries or, alternatively, should be distributed to the presumptive remainder beneficiaries currently. An applicant could reasonably argue in favor of accumulating trust income for ultimate distribution to the remainder beneficiaries when the trust terminates. However, because the trust prohibited a distribution to Sam and State University earlier than 10 years after Testator's death, the trust should not terminate under the acceleration of remainder doctrine. This fact makes the alternative of current income distribution to the remainder beneficiaries less likely.

Point Two (30–40%)

Trustee should not immediately pay over \$25,000 to Claimant because, as a creditor of a trust beneficiary, Claimant cannot have rights that exceed those of Sam, the beneficiary, and Sam has only a right to half of the principal in 10 years.

A creditor may reach a beneficiary's interest in a trust if the trust does not contain a spendthrift provision. *See* UTC § 501. But a beneficiary's creditor can have no greater rights in trust assets than the beneficiary, and a beneficiary of trust principal is not entitled to trust principal until the termination of all preceding estates. *See* RESTATEMENT OF PROPERTY § 156 (remainder as future right to property); RESTATEMENT (THIRD) OF TRUSTS § 2, cmt. d (trust beneficiaries have equitable estates). Thus, Claimant would not be entitled to any trust principal until the trust terminates. Indeed, if the trust principal were reachable during the 10-year period, then the rights of any income beneficiaries would be adversely affected because their rights are based on income derived from the entire principal.

Therefore, Claimant is not entitled to receive \$25,000 of trust principal. Claimant can only reach what Sam has—a right to receive trust principal after 10 years. Of course, Claimant would be entitled to a \$25,000 distribution from Trustee when the trust terminates, assuming that the judgment against Sam is still outstanding and that his interest in the trust at that time is at least \$25,000.

Point Three (25–35%)

At the end of the 10-year period, one-half of the trust principal should be distributed to Sam. The other half should be distributed, in all likelihood, to State Polytech in lieu of State University by application of the court's *cy pres* power.

The trust provides that, at the end of ten years, the trust principal shall be distributed equally to Sam and State University. Sam is entitled to half the principal at that time, subject to a possible \$25,000 reduction to pay Claimant. (*See* Point Two.)

The other half of the principal is payable to State University, but this gift cannot be paid because State University no longer exists. However, State University is a charity. It is a well-established principle of trust law that, when a charitable purpose cannot be carried out, the court should determine whether to exercise its *cy pres* power and redirect the charitable gift to another like charity. See UTC § 413; RESTATEMENT (THIRD) OF TRUSTS § 67.

The *cy pres* doctrine requires an initial inquiry into the settlor's intent: if the court determines that the settlor had a specific charitable intention limited to the stated charitable purpose, the gift goes to the residuary legatee, in this case Donna. However, if the court determines that the settlor had a general charitable intention, it should substitute for the named charity another charity that is consistent with the settlor's intentions. *Id.* Both the UTC and Restatement (Third) of Trusts presume that a settlor has a general charitable intent. *Id.*

Given the presumption of general charitable intent, there is a strong argument that the court should exercise its *cy pres* power and substitute the fine arts program at State Polytech for that at State University. The will evidences a desire to benefit a fine arts program. It evidences no intention of limiting that benefit to the program at State University. Testator could not have known that State University would cease to exist after his death. The state legislature has already determined that State University's fine arts program largely duplicates that at State Polytech. Substituting State Polytech for State University would maintain Testator's commitment to the fine arts and public education in his state of residence. *Cf.* RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. e (providing that, if the testator leaves money to a particular university to teach courses in dianetics, and the university refuses to accept the funds on that basis, the court may permit the legacy to be applied to the establishment of such a course in another university, assuming the settlor has not provided otherwise).

If the court does not apply the *cy pres* doctrine, the gift to charity fails and the share State University was intended to receive either passes wholly to Sam as the only remainder beneficiary or wholly to Donna, the residuary legatee under Testator's will.

FEDERAL CIVIL PROCEDURE IV.D.

ANALYSIS

- Legal Problems:
- (1) Are accident and investigative reports discoverable when they are prepared in the ordinary course of business and not in anticipation of any immediately pending litigation?
 - (2) Is information in a bus operator's personnel file about the operator's driving record, safety record, and disciplinary record discoverable in an action against the bus operator's employer that alleges the bus operator was driving negligently?

DISCUSSION

Summary

The motion to compel should be granted in part and denied in part. Federal Rule of Civil Procedure 37(a) provides that a party may be compelled to provide discovery. Here, the accident and investigative reports are not trial preparation materials that are protected under Fed. R. Civ. P. 26(b)(3). They are routine reports that were not prepared in anticipation of litigation. Records in the operator's personnel file regarding his driving and safety record are relevant and discoverable under Fed. R. Civ. P. 26(b)(1). That information is related to his driving skills and his employer's potential liability. On the other hand, the operator's disciplinary records may not be discoverable. While some disciplinary information may relate to the issues in the case, other disciplinary information may have nothing whatever to do with the bus operator's driving skills, and its disclosure would serve simply to harass and embarrass the bus operator. A court may order an *in camera* review to excise irrelevant material before allowing release of the personnel file.

Point One (35–45%)

The motion to compel production of the accident and investigative reports should be granted because they were not prepared in anticipation of litigation.

Under Fed. R. Civ. P. 26(b)(1), a party “may obtain discovery regarding any matter, not privileged, that is relevant to [a] claim or defense” in the action. Relevant information is discoverable even if it would be inadmissible at trial, so long as “the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” FED. R. CIV. P. 26(b)(1). There is no question that the bus operator's accident report and his supervisor's investigative report satisfy this relevancy requirement.

On the other hand, Fed. R. Civ. P. 26(b)(3) protects trial preparation materials from discovery. Materials “prepared in anticipation of litigation or for trial by [a] party” are discoverable only

if the party seeking discovery can show a “substantial need” for the materials and an inability “without undue hardship to obtain the substantial equivalent of the materials by other means.” FED. R. CIV. P. 26(b)(3).

Thus, the crucial question is whether the accident reports that the bus operator and the supervisor completed were “prepared in anticipation of litigation” within the meaning of this rule. *Broadnax v. ABF Freight Sys., Inc.*, 180 F.R.D. 343, 346 (N.D. Ill. 1998). On the facts of this problem, they were not. Both the bus operator’s report and the supervisor’s report appear to be standard Transit Authority business records that are routinely prepared in the event of an accident. The facts say that the bus operator was following standard procedure when he called his supervisor and when he completed the “Operator’s Report of Accident” form. Similarly, the supervisor was following standard procedure when she went to the accident scene and completed the “Supervisor’s Investigative Report” form. While Transit Authority may honestly claim that it has such procedures precisely because it “anticipates” that there may be litigation whenever there is an accident, routinely prepared records that are completed in the regular course of business do not become trial preparation materials merely because the business anticipates that they might be useful in litigation.

The timing for completion of the reports supports the conclusion that they were not prepared in anticipation of litigation. The bus operator began to complete his report immediately after the accident occurred. The supervisor completed the investigative report on the same day of the accident and within one hour of the time that the accident occurred. Accident and investigative reports like the ones described here are protected from discovery only when they are prepared in response to a threat of imminent litigation. *Id.*; *Wikel v. Wal-Mart Stores, Inc.*, 197 F.R.D. 493 (N.D. Okla. 2000). There was no threat of litigation when these reports were completed. Therefore, these materials are discoverable. *Id.*; *see also* FED. R. CIV. P. 26(b)(3) (Advisory Committee’s note).

Point Two (55–65%)

Under Fed. R. Civ. P. 26(b)(1), the bus operator’s driving and safety records are relevant because they address his driving skills and care in a case that involves his alleged negligent driving, but his disciplinary record may not be relevant. Thus, the court is likely to order disclosure of the personnel file, but it may restrict disclosure or use of the information in some fashion.

As noted above, parties to an action “may obtain discovery regarding any matter, not privileged, which is relevant to the claim or defense of any party.” FED. R. CIV. P. 26(b)(1). Even if not directly relevant to a claim or defense, a matter that is relevant to the general “subject matter involved in the action” may be discovered if the court determines that there is good cause for such discovery. *Hill v. Motel 6*, 205 F.R.D. 490, 492 (S.D. Ohio 2001). The facts and the circumstances of each particular case determine the relevancy of information that a party seeks during discovery. *Id.* Accordingly, in its discretion, and in light of the facts of each case, the court decides whether the requested information is relevant. *Coleman v. American Red Cross*, 23 F.3d 1091, 1096 (6th Cir. 1994).

Personnel records are discoverable, *Goldman v. Checker Taxi Co.*, 325 F.2d 853 (7th Cir. 1963), despite frequent claims that they should be protected for privacy reasons, *Gohring v. Case Corp.*, 43 F.3d 340, 342–43 (7th Cir. 1994). Where discovery is resisted, the court must balance the

interest of the party seeking discovery against any alleged privacy interest that would be infringed by disclosure. *Eckstein Marine Serv., Inc. v. M/V Basin Pride*, 168 F.R.D. 38 (W.D. La. 1996).

Here, Tourist has alleged that the bus operator was negligent. To the extent that the driving and safety records in the personnel file include material about this accident, they are clearly relevant to Tourist's claim. The bus operator's more general driving and safety records are a closer question. If they reveal a pattern of poor driving, they might be relevant to the claim against Transit Authority.

Even if it cannot be shown that the driving and safety information is directly relevant to the specific claim in this case, this seems a good case for showing good cause to compel production of the information because it is relevant to the subject matter of the lawsuit. An investigation of the bus operator's driving and safety record might lead to information of direct benefit to Tourist's case. Therefore, information in the bus operator's personnel file about his driving skills, including his driving record and any other accident reports, is discoverable. The motion to compel production of the personnel file should be granted, with respect to the driving records.

Regarding the bus operator's disciplinary records, the discovery request is much more troubling. The personnel record may well contain disciplinary information about the bus operator that could be entirely irrelevant to the action and that would be embarrassing and damaging to the bus operator if disclosed (*e.g.*, that he has been disciplined for sexual harassment). On the other hand, it is conceivable that the records might include evidence that could bolster Tourist's case, such as evidence of disciplinary action taken against the bus operator for driving-related behavior.

Under these circumstances, a court may limit Tourist's access to the bus operator's personnel files by restricting access to those portions deemed clearly relevant to the action. *See Rintchen v. Walker*, 1996 WL 238701 at *4 (E.D. Pa. 1996) (requiring defendants in an action alleging driving negligence to make available information in a personnel file including driving records and disciplinary records related to his driving skills, but forbidding disclosure of other information). Alternatively, a court might order an *in camera* review of the records to determine whether they contain anything of "a particularly sensitive or private nature" that warrants protection. *See Eckstein Marine Serv.*, 168 F.R.D. at 40–41. Or a court may order release of the entire file but enter a confidentiality order restricting access to the file to attorneys and parties reviewing it for purposes of the litigation. *Id.*

FAMILY LAW III.A., B., D.; CONFLICT OF LAWS I.B.; II.; III.C.6.

ANALYSIS

- Legal Problems:
- (1)(a) Does a court have jurisdiction to grant a divorce when one spouse has no contacts with the forum state?
 - (1)(b) Does a court have jurisdiction to divide marital property when one spouse has no contacts with the forum state?
 - (2) May a spouse who did not consent to a separation and believes that reconciliation is possible successfully oppose a divorce petition brought on grounds of separation and irreconcilable differences?
 - (3) When are assets owned by one spouse subject to division at divorce?

DISCUSSION

Summary

[NOTE: Applicants answering this question in a community property state should use community property principles. For this purpose, the phrase “marital property” means community property.]

A court that lacks personal jurisdiction over one spouse may grant a divorce, but may not issue a binding property division or support order. On the facts of this case, Husband could secure a divorce without Wife’s consent and despite Wife’s claim that the marriage could be saved if Husband entered counseling.

In all states, a court may divide marital property regardless of which spouse holds title. Property acquired during the marriage with employment income is marital property subject to division; inherited property and property acquired before marriage are separate property that is typically not subject to division. If the value of a separate asset is increased through marital funds or significant spousal labor, it may be apportioned into separate and marital components.

Point One(a) (15–25%)

A court that lacks jurisdiction over one spouse may grant a divorce.

Jurisdiction over both spouses is not necessary to dissolve a marriage. If the plaintiff spouse is a domiciliary of the forum state, courts of that state have jurisdiction to dissolve the plaintiff’s marriage. In *Williams v. North Carolina*, 317 U.S. 287 (1942) (“*Williams I*”), the United States Supreme Court likened a divorce action to an *in rem* proceeding in which the *res* is marital status. The court found that each spouse “carried” the marital status to the forum state when he or she established a new domicile in that state; thus a state court may grant its domiciliary’s divorce petition as long as he or she has satisfied the state’s jurisdictional requirements.

Domicile—residence with the intent to remain indefinitely—is a question of fact. *See Williams v. North Carolina*, 325 U.S. 226, 229–30 (1945) (“*Williams II*”). On these facts, Husband is almost certainly a domiciliary of State B. Husband moved to State B one year ago; he rented an apartment and obtained employment there; he has indicated that he never intends to return to State A. State B could thus grant Husband a divorce.

Point One(b) (15–25%)

A court that does not have jurisdiction over both spouses may not issue a binding property division order.

In an *ex parte* divorce, the court’s jurisdiction extends only to the marriage itself. Unless the court also has personal jurisdiction over the defendant spouse, it may not issue a binding order affecting personal rights such as property division. The divorce decree is thus “divisible.” *See Estin v. Estin*, 334 U.S. 541 (1948).

Unless the defendant is personally served within the forum state, a court does not have personal jurisdiction over a defendant who lacks “minimum contacts” with the state. *See Kulko v. Superior Court*, 436 U.S. 84 (1978). Wife was served with Husband’s divorce petition in State A. She has never been to State B; indeed, she knows no residents of State B except Husband. A State B court thus may not issue a binding support or property division order.

[NOTE: An applicant could receive extra credit for noting that a State B court could issue a binding property division order if Wife decided to participate in the State B divorce action. When both spouses participate in the divorce proceeding, principles of preclusion apply; because the participating spouse could have raised the jurisdictional issue in the forum state, he or she is bound by the forum state’s determination on this issue. *See Sherrer v. Sherrer*, 334 U.S. 343 (1948).]

Point Two (20–30%)

A court may order a divorce based on separation and irreconcilable differences even if the separation was nonconsensual and one spouse believes that reconciliation is possible.

In virtually all states, a spouse may obtain a divorce without a showing of fault or consent of the other spouse. The typical basis for a no-fault divorce is irreconcilable differences, a minimum period of separation, or both. *See HARRY E. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS* 557, 566 (5th ed. 2003).

Today, a no-fault divorce may be granted without any attempt at reconciliation. Even if one spouse establishes that marital discord arose from a curable condition (for example, addiction or profligate spending), the fact that one spouse believes that the marriage can be saved is not an adequate basis to deny the other spouse a divorce. *See, e.g., Hagerty v. Hagerty*, 281 N.W.2d 386 (Minn. 1979); *Eversman v. Eversman*, 496 A.2d 210 (Conn. App. Ct. 1985).

In states that require a minimum period of separation as the basis for a no-fault divorce, separation need not be consensual. *See, e.g., HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 517–18 (2d ed. 1988). The mandated period of separation is usually one year or less.

Thus, any effort by Wife to prevent the divorce would be unsuccessful. The parties have been separated for a year, Husband appears determined to secure the divorce, and Wife's belief that the marriage can be saved is legally irrelevant.

Point Three (30–40%)

Assets acquired before marriage or by inheritance are separate, not marital, property. In most states, neither separate property nor appreciation in its value is subject to division at divorce. However, the use of marital funds to add value or obtain increased equity in separate property creates marital property. Property acquired during the marriage with marital funds is marital property.

In all states, marital property is divided at divorce without regard to how that property is legally titled. Thus, the fact that the marital home, the stock, and the bonds are titled in Husband's name alone is not determinative of how the assets should be divided.

In a majority of states, "marital property" may be divided between the spouses, but "separate property" remains the property of the owning spouse. In a minority of "hotchpot" jurisdictions, the court may divide all assets, whenever or however acquired; a few states permit the division of separate property in special circumstances, such as hardship.

An asset is marital property if it was acquired during the marriage by any means other than gift, descent, or devise. An asset that is initially separate property may be transformed into marital property if marital funds or significant effort by the owner-spouse during the marriage enhances its value or builds equity. The fact that a separate asset appreciates in value during the marriage does not in itself transform that asset into marital property. *See* KRAUSE ET AL., *supra*, at 752, 763–64.

If State A is a majority jurisdiction, Husband's stock would be classified as separate property, the bonds as marital property, and the marital home as partly separate and partly marital. The stock was inherited, and there is no evidence that its value has been enhanced by Husband's efforts or with marital funds. The bonds, on the other hand, were purchased with marital property (money Husband earned during the marriage) and are therefore marital property. The marital home was purchased before the marriage, but with a mortgage; employment income was used to reduce the mortgage indebtedness and obtain additional equity in the house. In most states, such equity-building payments create marital property. *See* J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* § 7.05 (2006) (describing apportionment principles and noting that, in a few states, installment payments create only a marital lien against the value of the separate asset).

Thus, Wife is entitled to have a court make an equitable division of the bonds and the post-marriage increase in Husband's home equity. In most states, however, Husband's stock would be separate property, not subject to division upon divorce.

DECEDENTS' ESTATES II.I.7., I.9., K.

ANALYSIS

- Legal Problems:
- (1) How many shares of XYZ Company stock is Brother entitled to claim?
 - (2) What is the effect of Sister's disclaimer?
 - (3) Does the inter vivos gift of \$5,000 satisfy the bequest to Uncle?
 - (4) Given that there are insufficient assets to carry out all of Testator's directions, how should the bequests abate?

DISCUSSION

Summary

Sister's disclaimer effectively deletes her bequest from the will. The treatment of the remaining bequests turns on their classification. The specific bequest to Brother entitles him to 100 shares under the common law view and 106 shares under the Uniform Probate Code and like statutes. The general bequest to Uncle is not satisfied by the inter vivos gift. The general bequest to Uncle and the general bequest to Cousin will be abated pro rata. There are insufficient assets to satisfy the residuary bequest to Polytech. If Brother is not entitled to the six additional shares, two of them go to Uncle and four of them to Cousin in payment of their general legacies.

Point One (20–30%)

Whether Brother is entitled to 100 or 106 shares of XYZ stock depends on whether state law allocates stock dividends to a specific legatee.

The bequest to Brother of "my 100 shares" is a specific bequest. Many states hold that a stock dividend, like a cash dividend, is a property interest distinct from stock given by specific bequest. In these states, Brother is entitled only to 100 shares of XYZ stock. *See Note, Rights to Stock Accretions Which Occur Prior to Testator's Death*, 36 ALB. L. REV. 182, 188–192 (1971); Annotation, *Change in Stock or Corporate Structure, or Split or Substitution of Stock of Corporation, as Affecting Bequest of Stock*, 46 A.L.R.3d 7 §§ 8, 9 (1972).

In states that have adopted Uniform Probate Code § 2-605 or a like statute, a stock dividend is treated like a stock split instead of a cash dividend. Under this approach, which aims to maintain the legatee's percentage of ownership in the corporation, Brother is entitled to all 106 shares.

Point Two (20–30%)

The effect of Sister's disclaimer is that the property passes as if Sister had failed to survive Testator.

At common law and under the Uniform Probate Code, Sister's disclaimer causes Testator's property to pass as if Sister had failed to survive Testator. *See* UNIF. PROBATE CODE § 2-1106 (current version, incorporating the 1999 Uniform Disclaimer of Property Interests Act); UNIF. PROBATE CODE § 2-801 (earlier versions). Because Sister has no descendants who survive Testator, the state's anti-lapse statute will not be applicable to the bequest to Sister. The \$3,000 bequest to Sister lapses.

Point Three (20–30%)

The inter vivos gift of \$5,000 does not satisfy the bequest to Uncle.

The bequest of \$5,000 to Uncle is a general pecuniary bequest. Under the common law, an inter vivos gift made after a will's execution can satisfy a general bequest, but only if the testator so intends. Here, there is no evidence of such intention. Moreover, no presumption of such intention exists where, as here, the testator does not stand in loco parentis to the legatee. *See* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 133 (2d ed. 1953). Uniform Probate Code § 2-609 produces the same result because none of the statutory bases for satisfaction of a bequest by inter vivos gift have been met: the will does not provide for deduction of the gift, and neither the testator nor the legatee has declared in a contemporaneous writing that the gift is in satisfaction of the bequest.

Point Four (20–30%)

The bequests abate according to their classifications, hence in the following order: first the residuary gift to Polytech, then the general gifts to Uncle and Cousin, pro rata, and last, the specific gift to Brother.

Under both the common law and the Uniform Probate Code, the shares of distributees abate in the following order: (1) property not disposed of in the will, (2) residuary gifts, (3) general gifts, and (4) specific gifts. Abatement within each category is pro rata. *See* UNIF. PROBATE CODE § 3-902; WILLIAM M. MCGOVERN JR. & SHELDON F. KURTZ, WILLS, TRUSTS, AND ESTATES § 8.2 (3d ed. 2004). Thus, the residuary gift to Polytech abates first; Polytech receives nothing. The general gifts to Uncle and Cousin abate next and pro rata, meaning that the 1-to-2 ratio of Uncle-to-Cousin is maintained. Thus, Uncle and Cousin receive \$3,000 and \$6,000, respectively, plus (under the majority view but not under the Uniform Probate Code) two and four shares, respectively, of XYZ Company stock. Finally, Brother receives the XYZ Company stock to which he is entitled: 100 shares under the common law view and 106 shares under the Uniform Probate Code and like statutes.

AGENCY AND PARTNERSHIP IX.A., B.

ANALYSIS

- Legal Problems:
- (1) Is a limited partner entitled to (a) copies of contracts between the limited partnership and entities related to or controlled by the general partner, (b) copies of contracts generally between the limited partnership and other entities, (c) copies of the limited partnership's federal and state tax returns, and (d) copies of all correspondence between the limited partnership and all other parties for a five-year period?
 - (2) If the limited partners remove the general partner, are they by that act alone liable to persons who transact business with the partnership?
 - (3) If the limited partners, after removing the general partner, run the limited partnership until a replacement general partner can be found, are they liable to persons who transact business with the partnership?

DISCUSSION

Summary

Limited partners have a right to obtain from the general partner "upon reasonable demand" information regarding the state of the business and financial condition of the limited partnership, copies of tax returns, and such other information regarding the partnership's affairs as is just and reasonable. In this case, the tax returns are clearly required to be disclosed, the contracts are required to be disclosed under both the financial condition requirement and the other information requirement, and the correspondence is probably required to be disclosed under the other information requirement (although a court could conclude that the request is unreasonably broad).

Limited partners have the right to remove a general partner without that act being treated as an exercise of "control" of the limited partnership and without becoming liable for the limited partnership's obligations.

If, following removal of the general partner, the limited partners choose to run the partnership's business, then they will be exercising control over the limited partnership and each limited partner will be liable to persons who reasonably believe, based upon the limited partner's conduct, that the limited partner is acting as a general partner. Aggressive disclosure of the limited partners' status as limited but not general partners, could limit such liability.

Point One (40–50%)

A limited partner is absolutely entitled to copies of tax returns and is entitled to such copies of contracts and correspondence as is just and reasonable.

Under the Revised Uniform Limited Partnership Act (RULPA), a limited partner has a right to “inspect and copy” partnership records that are required to be kept pursuant to § 105 of the Act, and, in addition, to obtain from the general partner “upon reasonable demand”:

“true and full information regarding the state of the business and financial condition of the limited partnership,” RULPA § 305(2)(i);

“promptly after becoming available, a copy of the limited partnership’s federal, state, and local income tax returns for each year,” RULPA § 305(2)(ii); and

“other information regarding the affairs of the limited partnership as is just and reasonable.” RULPA § 305 (2)(iii).

In some jurisdictions, the reasonableness of a demand will depend, in part, on the purpose for which the limited partner is seeking disclosure. *See, e.g., Madison Ave. Inv. Partners, LLC v. America First Real Estate Inv. Partners, LP*, 806 A.2d 165 (Del. Ch. 2002). Where, as here, the limited partner has substantial reason to suspect mismanagement of the limited partnership and wishes to obtain partnership documents to investigate the matter, the limited partner has a right to access those documents. *Id.*; *Somerville S Trust v. USV Partners, LLC*, 2002 WL 1832830 (Del. Ch. 2002).

Baker probably acted improperly in refusing to provide information in response to Tim’s request for “copies of contracts between the limited partnership and entities related to or controlled by the general partner.” This request should be covered under the first subsection of the Act because such information relates to the “business and financial condition of the limited partnership.” In addition, where there is a suggestion that a general partner is engaged in self-dealing, a limited partner’s request for specific information that would confirm or disprove that suggestion is surely “just and reasonable.”

Tim’s demands for “copies of contracts generally between the limited partnership and other entities” are also probably covered under the first and third subsections for the same reasons. Such information is potentially relevant both to the general “business and financial condition” of the partnership and to the possibility that Baker has been self-dealing.

The request for copies of the limited partnership’s federal and state tax returns is specifically covered under the second subsection of the statute. In addition, tax returns are documents that the limited partnership is required to keep and that a limited partner may inspect and copy at any time. RULPA § 305(2)(ii).

Tim’s request for “copies of all correspondence between [the limited partnership] and any other parties for the past five years” may go too far. This request must be honored, if at all, only if the request is “just and reasonable” under the third subsection of the statute. Whether a demand for

copies of all correspondence is “just and reasonable” is certainly debatable. Under the circumstances, Tim would claim that it is a reasonable demand that would provide information useful in determining whether Baker was properly managing the business. Baker would claim that the request goes far beyond what is reasonable, and is essentially an effort to delve into all the files of the business on a fishing expedition for evidence of wrongdoing.

Point Two (20–30%)

Limited partners are not liable as general partners simply for removing a general partner.

A limited partner is generally not liable for the obligations of a limited partnership. RULPA § 303(a). *See, e.g., Zeiger v. Wilf*, 755 A.2d 608 (N.J. Super. App. Div. 2000). However, a limited partner can become so liable if, “in addition to the exercise of his [or her] rights and powers as a limited partner, he [or she] participates in the control of the business.” RULPA § 303(a). Thus, the question as to whether the limited partners would be liable for partnership obligations were they to remove Baker as general partner would be resolved by determining whether the act of removing the general partner would be “participat[ion] in the control of the business.” *Id.*

Because of the inherent “difficulty of determining when the ‘control’ line has been overstepped,” RULPA (and the parallel laws of most states) specifically enumerates certain activities in which a limited partner may engage “without being deemed to have taken part in control of the business.” § 303(b), official cmt. This so-called “safe harbor” list of activities that do not constitute the exercise of control provides specifically that a “limited partner does not participate in the control of the business” for purposes of incurring liability under § 303(a) “solely by . . . proposing [or] voting [on the] . . . removal of a general partner.” § 303(b)(6)(v). Thus, the limited partners in Astoria may remove Baker as general partner without incurring liability for the limited partnership’s obligations.

In states that have adopted the 2001 Uniform Limited Partnership Act, the situation is even clearer. Limited partners are “not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership.” 2001 UNIF. LTD. P’SHIP ACT § 303. The new Act provides the limited partners a “full, status-based liability shield” akin to the protection given corporate shareholders. *Id.*, official cmt.

Point Three (20–30%)

Limited partners who participate in the control of the business can be held liable for the obligations owed by the limited partnership, but only to those persons who transact business with the limited partnership in the reasonable belief that the limited partner is a general partner.

Limited partners can become liable for the obligations of the limited partnership if they participate in the control of the business in ways not within the safe harbor exceptions in RULPA § 303(b). In particular, Tim’s suggestion that Tim, Uma, and Vivian jointly “run the limited partnership” after removing Baker from the role of general partner appears to contemplate a degree of involvement in the business of the partnership that exceeds what is permitted by any of the safe harbor exceptions. Moreover, the facts suggest that this management and control of the business

would necessarily constitute “participat[ion] in the control of the business,” as the removal of Baker would leave no one but the limited partners in control.

Participation in the control of the business can make a limited partner liable for the obligations of the limited partnership, but that liability extends only to “persons who transact business with the limited partnership reasonably believing, based upon the limited partner’s conduct, that the limited partner is a general partner.” RULPA § 303(a). Thus the limited partners could attempt to limit their liability when running the business by giving all the parties with which the limited partnership does business notice that they are limited, not general, partners. *See, e.g., Folgers Architects, Ltd. v. Kerns*, 612 N.W.2d 539, 550–51 (Neb. Ct. App. 2000), *rev’d in part and aff’d in part on other grounds*, 633 N.W.2d 114 (Neb. 2001).

In some jurisdictions, however, liability could be imposed, even without third-party reliance, if “a limited partner’s control activities are so extensive as to be ‘substantially the same as’ those of a general partner.” *Zeiger v. Wilf*, 755 A.2d 608, 618 (N.J. Super. App. Div. 2000). In these jurisdictions, Tim, Uma, and Vivian would be well-advised to make their limited role clear and to search diligently for a replacement general partner to make clear that their temporary control did not amount to taking on a role “substantially the same” as that of a general partner.

As noted earlier, the 2001 Uniform Limited Partnership Act “renders the control rule extinct.” 2001 UNIF. LTD. P’SHIP ACT § 303, official cmt. Under this Act, Tim, Uma, and Vivian would have no liability for partnership obligations even if they participated directly in the management and control of the limited partnership.

SECURED TRANSACTIONS II.D.; IV.B., F.

ANALYSIS

- Legal Problems:
- (1) Was the financing statement filed by National Bank sufficient to perfect its security interest in the monies owed to Feagle by Hotel Corporation?
 - (2) Was National Bank's security interest in the monies owed to Feagle by Hotel Corporation perfected automatically because National Bank did not receive a "significant part" of Feagle's accounts?
 - (3) As between National Bank's unperfected interest and State Bank's perfected interest, whose interest prevails?

DISCUSSION

Summary

National Bank's financing statement was insufficient to perfect its interest in the Hotel Corporation account because the financing statement was filed under Feagle's trade name rather than under its true corporate name. Moreover, the facts suggest that the Hotel Corporation account constituted a significant part of Feagle's accounts, thus precluding National Bank's interest from being perfected automatically. By contrast, State Bank filed a proper financing statement and had a perfected security interest in Feagle's accounts, including the Hotel Corporation account. State Bank's perfected security interest has priority over National Bank's unperfected interest, even though State Bank acquired its interest three months after National Bank.

Point One (35–45%)

Security interests in accounts may be perfected by a financing statement that complies with Code requirements; a filing in the name of a debtor's trade name instead of its official corporate name is not effective unless the trade name is so similar that it is not seriously misleading.

National Bank obtained a security interest in the monies owed by Hotel Corporation to Feagle by having Feagle sign an agreement granting National Bank an interest in the specified collateral. That collateral—the monies owed to Feagle by Hotel Corporation—is an "account" for purposes of Article 9 of the UCC. *See* UCC § 9-102(2) (a "right to payment . . . for services rendered or to be rendered" is an "account"). A security interest in accounts must ordinarily be perfected by filing a proper financing statement in the appropriate government office. UCC § 9-310(a).

In this problem, National Bank filed a financing statement, but the financing statement was ineffective. In order to be effective, a financing statement must sufficiently provide the name of the debtor. UCC § 9-502(a)(1). Where the debtor is a registered organization such as a corporation,

the financing statement must use the official registered corporate name of the debtor. UCC § 9-503(a)(1). A financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor. UCC § 9-503(c).

Although the UCC forgives minor errors that do not render the financing statement seriously misleading, UCC § 9-506(a), an error in the debtor's name is seriously misleading unless a search of the records under the debtor's correct name (Feagle Construction Company, Inc.) using the filing office's standard search logic would disclose the financing statement. UCC § 9-506(b), (c). Because of the complete dissimilarity between the trade name (On Top Roofing) under which the financing statement was filed and the debtor's correct name (Feagle), this financing statement would be found ineffective and National Bank's security interest will not be perfected by filing.

Point Two (35–45%)

A security agreement in accounts may be perfected automatically if the assignment of accounts did not transfer a significant part of the assignor's outstanding accounts to the creditor. Given that the Hotel Corporation account appears to constitute a significant portion of all Feagle's outstanding accounts, and considering that National Bank is a professional lender, not a casual or isolated lender, National Bank's security interest will probably not be considered to have been automatically perfected.

In addition to providing for perfection of a security interest in accounts by filing, the UCC provides for perfection upon attachment (known as automatic perfection) for assignments of accounts that do not "transfer a significant part of the assignor's outstanding accounts" to the secured party. UCC § 9-309(2). Under the facts given, National Bank received an assignment of only one of Feagle's several outstanding accounts. However, the single Hotel Corporation account was, at the time of default, worth more than all Feagle's other accounts combined. The question, then, is whether this assignment of a single account was a transfer of "a significant part" of Feagle's outstanding accounts.

The UCC gives no guidance on the meaning of "significant part," but National Bank will have a difficult time arguing that an account amounting to more than 50 percent of the total value of Feagle's accounts is not significant. Moreover, the comments to UCC § 9-309(2) suggest that its purpose is to protect "casual or isolated assignments . . . which no one would think of filing," and that persons who "regularly" take assignments should file. National Bank took the assignment from Feagle as a part of a normal secured financing arrangement; it was a standard business transaction of the sort that almost always includes the filing of a financing statement. Indeed, National Bank did file (albeit ineffectively).

On these facts it is highly likely that a court would conclude that National Bank's interest was not automatically perfected.

Point Three (10–20%)

State Bank has first priority because its interest is perfected while National Bank's is not.

A perfected security interest has priority over a conflicting unperfected interest. UCC § 9-322(a). Because National Bank's interest was unperfected (*see* Points One and Two) and State Bank's interest was perfected, State Bank has priority under the UCC.

[NOTE: If an applicant mistakenly concludes that National Bank's interest was perfected either by filing or automatically, then the applicant should conclude that National Bank would have priority over State Bank under the "first to file or perfect" rule. UCC § 9-322(a). Consider giving full credit for Point Three in this circumstance, at least if the applicant's answer shows a full understanding of the priority rules and is wrong only because the applicant erroneously concluded that National Bank's interest was perfected.]

July 2007
Questions

Question 1

Baker is a renowned pastry chef. Café, a sole proprietorship, is a well-known restaurant in need of hiring a pastry chef. Baker and Café's Owner had extensive conversations regarding Baker coming to work at Café. On May 1, a week after those conversations occurred, Baker sent Café a signed letter dated May 1 stating: "I will work for Café as head pastry chef for two years for an annual salary of \$100,000."

On the morning of May 7, Café's Owner telephoned Baker and said: "The \$100,000 is pretty stiff. Could you possibly consider working for less?" Baker replied: "I am a renowned pastry chef. I will not work for any less!"

Later that morning, Café's Owner sent Baker a signed letter by regular mail stating: "You obviously think you are too good for my restaurant. I am no longer interested in hiring you to work at Café."

Later that afternoon, Café's Owner had a change of heart and sent Baker a registered, express-mail signed letter stating: "Okay, if you really won't work for less, I agree to pay you the \$100,000 a year you demand to work as head pastry chef at Café for two years."

On May 10, the registered, express-mail letter was delivered to Baker's office. The regular-mail letter containing the rejection was still on its way. Baker accepted delivery of the registered, express-mail letter from the postal carrier and placed it on his desk without opening it.

On May 11, before Baker read the registered, express-mail letter on his desk, he accepted an offer to work for Restaurant. As a courtesy, Baker called Café's Owner and said, "Sorry, I just took a job at Restaurant. Too bad you couldn't afford me." Café's Owner responded, "You can't work for Restaurant; I already accepted your offer to work at Café for \$100,000 a year."

Does Café have an enforceable contract with Baker? Explain.

Question 2

Al is a citizen and domiciliary of State A. While Al was visiting his parents in State B, he was involved in an automobile accident. Al's sports car was demolished in the accident, but he was miraculously unhurt. He returned to his home in State A shortly after the accident. Bert, a citizen and domiciliary of State B who was the driver of the other automobile involved in the accident, was not so lucky. Bert was seriously injured in the accident and was hospitalized for several weeks.

Shortly after Bert's release from the hospital, Al sued him in the federal district court for State B. Al's complaint properly invoked the court's diversity jurisdiction, alleged that the collision had been caused by Bert's negligence, and sought \$90,000 in damages (the value of Al's demolished sports car).

Bert, who was uninsured and unemployed, failed to answer Al's complaint and did not defend the action, despite having been properly served and having received notice of the action. The court entered a default judgment against Bert for \$90,000. The judgment was not paid, and Al took no steps to enforce it.

One year after the accident, Al died at his home in State A. His estate is being administered by Executor, who is a citizen of State B.

Bert recently filed a timely lawsuit against Executor, as administrator of Al's estate. The lawsuit, filed in state court in State B, alleges that Al's reckless driving was the cause of the accident and that Bert is permanently disabled by the injuries he suffered in the accident. Bert is seeking \$3 million in damages from Al's estate.

Executor filed a timely notice of removal of the state action with the federal district court in State B. She then served the notice on Bert and filed a copy with the State B state court. She also arranged for copies of all records and proceedings in the state court action to be filed with the clerk of the federal district court in State B. Executor then filed a timely motion with the federal district court to dismiss Bert's case with prejudice on the grounds that it was barred by the prior default judgment awarded to Al in his earlier suit against Bert.

Bert has filed a timely motion with the federal court asking it to remand the action to state court on the ground that the requirements for removal are not met on these facts. Alternatively, in the event the federal court retains the action, Bert has asked it to deny Executor's motion to dismiss.

1. Was removal of Bert's claim to federal district court appropriate? Explain.
2. If the federal court retains the action, should it grant Executor's motion to dismiss Bert's suit? Explain.

Question 3

Husband and Wife married eleven years ago when both were age 19 and college students. Husband planned to go to medical school and Wife planned to become an accountant. They decided that Wife would defer her educational plans in order to provide support while Husband completed his medical studies. Accordingly, Wife dropped out of college, took a job as a file clerk, and did all of the household chores in order to allow Husband more time to study. This arrangement continued while Husband completed his remaining three years of college, four years of medical school, and a three-year medical residency. Wife expended all of her earnings to support Husband and herself. Husband made minimal financial contributions to the marriage.

Throughout the marriage, Husband was verbally abusive to Wife and occasionally hit her. Husband was always contrite after these incidents and attributed his behavior to stress resulting from his studies.

Three months before Husband completed his medical residency, he and Wife had an argument. During the argument, Husband assaulted Wife and broke her arm. Wife left Husband and filed a petition for divorce.

Husband suggested to Wife that they meet with a divorce mediator, Mediator. Wife agreed to this proposal. Husband and Wife both gave Mediator information about their assets and incomes. Husband indicated that his post-residency salary would be \$150,000 per year, listed no assets, and listed school debts totaling \$50,000. Wife indicated that her salary was \$30,000 per year and listed no assets. Wife also indicated that she intended to return to college in the fall and that her income would then decline.

Last month, Husband and Wife met with Mediator. Mediator did not explain anything about the mediation process or divorce law, nor did she inform Husband and Wife that they could obtain independent legal advice about any agreement reached through mediation. Instead, Mediator asked Husband for a settlement proposal. Husband proposed that each spouse keep his or her personal property and that Husband bear responsibility for his educational loans. Mediator responded, "That sounds like a fair settlement. I'll prepare the paperwork unless Wife objects." Within the view of Mediator and Wife, Husband tightened his fist and gave Wife a menacing look. Wife said, "I have no objection."

After signing the agreement prepared by Mediator, Wife learned that Mediator was an attorney who had represented Husband's family for many years and that Husband had talked to Mediator about the settlement shortly before their meeting.

No divorce judgment has yet been entered.

Wife has petitioned the trial court to set aside the settlement agreement she and Husband had signed and to award her spousal maintenance of \$25,000 per year for three years.

July 2007, Question 3

1. On what grounds, if any, could the court set aside the settlement agreement? Explain.
2. If the settlement agreement is set aside, is Wife entitled to spousal maintenance? Explain.

Question 4

Talker is a persuasive salesperson, Fixer is a talented carpenter, and Manager is an experienced small business manager. The three are friends and often discussed going into business together. Two months ago they orally agreed to form a cabinet restoration business and to share profits equally.

The three friends began doing business under the name TFM Restored Cabinets (TFM). Manager collected accounts receivable, paid all bills, and distributed the profits equally among the three. Fixer restored the cabinets, and Talker marketed them. The three friends operated independently in performing their respective duties, but they met periodically to discuss and decide other business matters.

Everything went smoothly until Fixer announced that he intended to hire Crafty to help with the restoration work because there was more work than one carpenter could handle. Talker and Manager opposed hiring Crafty. They believed that most of TFM's customers were attracted by Fixer's reputation and that the business would be harmed if Crafty performed restoration work. Despite their objections, Fixer hired Crafty.

One month later, Crafty quit after Manager refused to pay for the work that Crafty had performed.

1. What is the legal relationship of Talker, Fixer, and Manager? Explain.
2. Did Fixer have authority to hire Crafty on behalf of TFM? Explain.
3. Under what circumstances, if any, could Crafty collect from Talker the wages TFM owes Crafty? Explain.

Question 5

Defendant and Friend were on a hunting trip together. One evening, while watching television in their hunting cabin, Defendant decided to scare Friend, who had fallen asleep in his chair. Defendant loaded his rifle and aimed it at a lamp that was on a table just behind the chair in which Friend was sleeping. Just as Defendant pulled the trigger to shoot the lamp, Friend suddenly sat up and moved into the line of fire. Defendant's bullet hit Friend in the shoulder and seriously wounded him.

Defendant loaded Friend into his car and sped off toward the nearest hospital, which was 15 minutes away. En route, Defendant hit a pothole, lost control of his car, and collided with a telephone pole. Defendant was seriously injured, and Friend suffered further injuries. The accident occurred on a lightly traveled country road, and no other vehicle passed by for 45 minutes.

By the time help arrived, Friend was dead. An autopsy established that Friend bled to death as a result of the combined impact of the gunshot wound and the injuries suffered in the car crash. The coroner concluded that the gunshot wound alone would not have been fatal had Friend received medical treatment within a half hour of the shooting.

Murder is defined as "a killing with malice aforethought." In this jurisdiction, second-degree murder is "all murder that is not deliberate or premeditated." Defendant has been charged with second-degree murder on account of his shooting Friend and Friend's subsequent death.

Is Defendant guilty of second-degree murder? Explain.

Question 6

Owen owned vacant land (Whiteacre) in State B located 500 yards from a lake and bordered by vacant land owned by others. Owen, who lived 50 miles from Whiteacre, used Whiteacre for cutting firewood and for parking his car when he used the lake.

Twenty years ago, Owen delivered to Abe a deed that read in its entirety:

Owen hereby conveys to the grantee by a general warranty deed that parcel of vacant land in State B known as Whiteacre.

Owen signed the deed immediately below the quoted language and his signature was notarized. The deed was never recorded.

For the next 11 years, Abe seasonally planted vegetables on Whiteacre, cut timber on it, parked vehicles there when he and his family used the nearby lake for recreation, and gave permission to friends to park their cars and recreational vehicles there. He also paid the real property taxes due on the land, although the tax bills were actually sent to Owen because title had not been registered in Abe's name on the assessor's books. Abe did not build any structure on Whiteacre, fence it, or post no-trespassing signs.

Nine years ago, Abe moved to State C. Since that time, he has neither used Whiteacre nor given others permission to use Whiteacre, and to all outward appearances the land has appeared unoccupied.

Last year, Owen died intestate leaving his daughter, Doris, as his sole heir. After Owen's death, Doris conveyed Whiteacre by a valid deed to Buyer, who paid fair market value for Whiteacre. Neither Doris nor Buyer knew of the Owen-to-Abe deed. Both Doris and Buyer believed that Owen was the owner of Whiteacre at the time of his death. Buyer promptly and properly recorded the deed from Doris and immediately went into possession of Whiteacre.

Last month Abe returned to State B. When he discovered Buyer in possession of Whiteacre, he sued Buyer for possession.

State B has enacted the following statutes:

1. Actions to recover possession of real property shall be brought within ten years after the cause of action accrues.
2. No conveyance or mortgage of real property shall be good against subsequent purchasers for value and without notice unless the same be recorded according to law.

Who is entitled to possession of Whiteacre? Explain.

Question 7

Sam worked as an administrative assistant to the president of Corporation. In this capacity, Sam had responsibility for opening all of Corporation's mail. If the mail contained any checks, Sam was supposed to secure the indorsement of the president in the name of Corporation and deposit the checks in Corporation's bank account.

One day, Corporation received a \$3,000 check. When the check arrived at Corporation's offices, Sam secretly took it from the mail, concealed it in his coat pocket, and took it home. That night, Sam fraudulently indorsed the check in the name of Corporation. Sam then mailed the check to Lender with instructions to cover a \$3,000 mortgage payment on Sam's home.

Acting in good faith, Lender applied the amount of the check to reduce Sam's indebtedness on his mortgage by \$3,000. Before Lender could deposit the check, Corporation learned of Sam's actions. Corporation told Lender that it owned the check and demanded that Lender return it.

Must Lender return the check to Corporation? Explain.

Question 8

Settlor, age 60, consulted an attorney, Attorney, about the creation of a trust. Settlor gave Attorney a memorandum containing the following information about his family:

Family Members	Relationship	Age
1. Wife	Spouse	48
2. Son	Child	21
3. Daughter 1	Child	16
4. Daughter 2	Child	10
5. Grandchild	Grandchild (Son's child)	1

Settlor also outlined his goals in creating the trust:

1. I want to fully control trust assets and enjoy all trust income until I die.
2. After I die, I want trust assets used to ensure that Wife is comfortably provided for. I also want Wife to be able to use trust assets to reward, in her will, whichever children have been most helpful to her. I don't want Wife to be a trustee; she doesn't have the financial background.
3. After Wife dies, I want my children to get the remaining trust assets. But, of course, if Son dies before Wife, I'd want his share to go to Grandchild.
4. I'm planning to fund the trust with cash and stocks. I may want to add some other assets later, but I'm not sure.

Based on the information provided by Settlor, Attorney drafted the following trust instrument:

SETTLOR TRUST AGREEMENT

1. I appoint Bank as trustee of the Settlor Trust.
2. I direct Bank to hold all assets listed on Schedule A in trust, and I direct Bank to dispose of these assets as follows:
 - a. Bank shall pay all trust income to Settlor during Settlor's lifetime.
 - b. After Settlor's death, Bank shall pay trust income and principal to Wife in such amounts as Bank, in its sole discretion, deems appropriate.
 - c. After Wife's death, Bank shall distribute all remaining trust assets equally among Settlor's surviving children, share and share alike.
3. Bank accepts and agrees to faithfully carry out the terms of this trust.
[Signatures, dates, and acknowledgments are omitted.]

SCHEDULE A

12,000 shares of XYZ Corporation common stock
\$150,000 (cash)

How would you revise the Settlor Trust Agreement to more fully meet Settlor's stated goals? Explain.

Question 9

Last July Art, Brett, and Chad formed LeaseAll Limited Liability Company (LLC), to lease personal property to individuals and businesses. Art, Brett, and Chad had equal ownership interests in LLC and entered into a written operating agreement (OA). Under the OA, only Art had authority to manage the business, to hire and fire employees, and to buy and sell real and personal property. Art contributed a business plan and his expertise to the leasing business, and Brett and Chad each contributed \$50,000 to the capital of LLC.

Over the next year, Brett and Chad did not participate in the business. No meetings were held, and Art did not provide Brett or Chad with any information about LLC. In accordance with the business plan, Art purchased, in the name of LLC, a building and inventory for the leasing business.

Things have not gone well for LLC. Its initial capital is exhausted, and the cash generated by operations is inadequate to allow it to pay its debts as they come due. Additionally, one of LLC's customers, Peter, was badly injured when a chainsaw he rented from LLC malfunctioned. Peter sued LLC and obtained a judgment of \$500,000. LLC does not have liability insurance because Art forgot to sign the check when he sent the premium payment to the insurance company and, as a result, the company did not issue the policy. LLC cannot pay Peter's judgment from its current capital.

1. If Brett and Chad bring an action against Art to recover damages claiming that Art mismanaged LLC, should that action be direct or derivative and what corporate law requirements must they meet before bringing an action? Explain.
2. Did Art breach his fiduciary duty in managing LLC? Explain.
3. Can Peter recover the \$500,000 judgment against LLC from Art, Brett, and/or Chad personally? Explain.

July 2007
Analyses

CONTRACTS I.A.; V.

ANALYSIS

- Legal Problems:
- (1)(a) Did Baker's letter of May 1 constitute an offer?
 - (1)(b) Did Café Owner's oral response on the morning of May 7 constitute a counteroffer?
 - (2) Did Café accept Baker's offer?
 - (3) Did the contract between Baker and Café satisfy the Statute of Frauds?

DISCUSSION

Summary

A valid contract requires an offer, an acceptance, and when, as here, the contract cannot be performed within one year, a writing that satisfies the Statute of Frauds. Here, Baker made an offer to work for Café that was accepted when Café's Owner sent an acceptance by express mail to Baker. It is irrelevant that Baker did not read the acceptance. The fact that an earlier rejection was mailed is also irrelevant because a rejection, unlike an acceptance, is effective only upon receipt, and Baker did not receive the rejection before receiving the acceptance. When both a rejection and an acceptance are sent, whichever is received first is effective. Lastly, the writings, being signed, satisfy the requirements of the Statute of Frauds. Therefore, Café has an enforceable contract.

Point One(a) (20–30%)

Baker's signed letter of May 1 to Café agreeing to work as a pastry chef for Café is a valid offer.

A person makes an offer when the person communicates to another a statement of "willingness to enter into a bargain, so made as to justify" the other person who hears the statement "in understanding that his assent to that bargain is invited and will conclude it." RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981). Here, Baker's letter of May 1 to Café was an offer because an objective recipient of the letter, such as Café, would reasonably conclude that assent would create a contract.

An offer cannot ripen into a contract by acceptance unless its terms are reasonably certain. *Id.* § 33(1). Here, the terms were clear and certain and identified the parties, the subject matter, and the price.

Point One(b) (20–30%)

Café Owner’s phone call to Baker on the morning of May 7 asking if he would possibly work for less was not a counteroffer but merely a request for changed terms.

A counteroffer is a statement from the offeree to the offeror, relating to the same subject matter as the original offer but suggesting a substituted bargain from the original terms. *Id.* § 39(1). Generally, if an offeree makes a counteroffer, the offeree can no longer accept the original offer. *Id.* § 39(2). Here, Café’s Owner said to Baker, “The \$100,000 is pretty stiff. Could you possibly consider working for less?” This utterance is not a counteroffer because it did not offer substitute terms to Baker and did not indicate any unwillingness to conclude the bargain on Baker’s terms if Baker would not accept an alternative salary. All Café’s Owner did was ask Baker if he could possibly work for less. Café’s Owner proposed no alternative salary. Because Café’s Owner’s call to Baker was not a counteroffer, but merely a request for unspecified changed terms, it did not preclude Café’s later acceptance of Baker’s offer.

Point Two (25–35%)

Although Café’s Owner initially rejected Baker’s offer in writing, he later accepted the offer. Because Baker received the acceptance before he received the rejection, Baker’s offer is deemed accepted.

A rejection is a manifestation of intent not to accept an offer. *Id.* § 38(2). A rejection terminates the offeree’s power to accept an offer. *Id.* § 38(1). However, a rejection does not extinguish the offeree’s right to accept an offer until the rejection is received by the offeror. *Id.* § 40. Here, Café’s Owner’s letter stating “I am no longer interested in hiring you” clearly manifests an intent not to go forward with the bargain and constitutes a rejection of Baker’s offer.

However, Café’s Owner’s second letter, in which Café agreed to Baker’s terms, was an acceptance because it was a manifestation of assent to the terms of an offer made in a manner invited by the offer. *Id.* § 50(1). The question then becomes, Which of the two letters sent by Café’s Owner is effective, the rejection or the acceptance?

An acceptance is effective upon dispatch under the so-called “mailbox rule.” *Id.* § 63. A rejection is effective only upon receipt. But when an acceptance is sent after a rejection (that is, both the acceptance and the rejection are sent), whichever gets to the recipient first is effective. *Id.* § 40. Here, Café’s letter of acceptance was received by Baker first, while the letter containing the rejection was still on the way to Baker. *See id.* § 68 (a communication is received when it comes into the possession of the person to whom it is addressed). The fact that Baker did not read the letter does not alter this result. Because the acceptance was the first communication received, it is effective. Therefore, Café accepted Baker’s offer to work for Café, and a contract was created.

Point Three (25–35%)

If a contract cannot be performed within a year, it must meet the requirements of the Statute of Frauds. Here the contract satisfies that statute and, therefore, is enforceable.

A contract must satisfy the Statute of Frauds if it cannot be fully performed within one year. *Id.* § 130. Here, the two-year employment requirement cannot be completed in one year, and there-

fore the contract is within the purview of the Statute of Frauds and must satisfy the requirements of the Statute of Frauds to be enforceable.

A contract within the Statute of Frauds satisfies that statute and is enforceable if it is evidenced by a writing signed by “the party to be charged,” which (a) reasonably identifies the subject matter of the contract; (b) is sufficient to indicate that a contract has been made; and (c) “states with reasonable certainty the essential terms” of the contract. *Id.* § 131.

Here, each party signed a writing that is sufficient under these criteria as it identifies the position, person, term, and salary. Therefore, the Statute of Frauds is satisfied and the employment contract is enforceable. Because this is a personal services contract, if Baker refuses to work for Café, Café can sue Baker for damages, but cannot get specific performance.

FEDERAL CIVIL PROCEDURE I.A., B., E.; IV.C.; VI.E.

ANALYSIS

- Legal Problems:
- (1)(a) What are the requirements for an action to be removed from a state court to a federal court?
 - (1)(b) Are those requirements met in a suit against a decedent's estate executor when the executor is a citizen of the same state as the plaintiff but the decedent was not?
 - (2)(a) Can the default judgment against Bert have preclusive effect in subsequent cases even though Bert never appeared to defend himself?
 - (2)(b) Is Bert's claim against Al so closely related to Al's original claim that Bert is barred from raising it in a subsequent action?

DISCUSSION

Summary

Bert's tort action against Al's estate raises a state law claim and may be removed to federal court only if the federal court would have had diversity jurisdiction over the action had it originally been filed in that court. Moreover, the case cannot be removed if any defendant is a citizen of the state in which the case is pending. In this case, removal was proper. The amount in controversy clearly exceeds the \$75,000 threshold. Although Executor is a citizen of State B and not diverse from Bert, she is a party to the action only in her capacity as a representative of Al's estate, and for diversity and removal purposes she is "deemed to be a citizen only of the same state as the decedent." Thus, Executor is treated as a State A citizen, the diversity requirements are met, and removal is appropriate.

Bert's action is barred by the default judgment in the prior suit between Bert and Al and should therefore be dismissed by the federal court. A default judgment is conclusive and binding on the parties if, as here, the rendering court had jurisdiction over the subject matter and the parties. Bert's claim against Al arose out of the same transaction or occurrence as Al's original claim, and the same evidence would have been relevant to the disposition of both claims. Under Federal Rule of Civil Procedure 13(a), Bert's claim was a compulsory counterclaim which Bert was required to raise in the initial action and, under standard rules of preclusion, Bert is barred from bringing a subsequent action asserting that claim.

Point One(a) (25–35%)

Removal of a case from a state court is appropriate if the federal court in that state would have original jurisdiction over the action and the defendant is not a citizen of that state.

An action filed in state court may be removed to the federal district court of the district where the state action is pending if the district court has “original jurisdiction” over the action. 28 U.S.C. § 1441(a). The federal court would have jurisdiction over Bert’s state law tort action against Al only if the requirements of diversity are met. The amount in controversy must exceed \$75,000 and the parties must be diverse (citizens of different states). 28 U.S.C. § 1332. In addition, removal by a defendant is prohibited if the defendant is a citizen of the state where the action is pending. 28 U.S.C. § 1441(b).

Point One(b) (25–35%)

Because Executor is “deemed to be a citizen only of the same state as the decedent,” the parties to the state court action were diverse and the case was properly removable to the federal court pursuant to the court’s diversity jurisdiction.

The requirements for removal are met here. Bert’s complaint seeks damages of \$3 million for personal injuries leading to permanent disability. This clearly exceeds the required amount in controversy, and there is nothing to suggest that the damage claim is not made in good faith. The parties are diverse because diversity depends on the citizenship of Bert and the decedent, Al, not the citizenship of Bert and Executor. Although Executor is the named defendant, for diversity purposes Executor is “deemed to be a citizen only of the same state as the decedent,” the person whose interest she represents. 28 U.S.C. § 1332(c)(2). The decedent, Al, was a citizen of State A and therefore was diverse from Bert, a State B citizen. The requirements of diversity jurisdiction are therefore satisfied and the case is removable.

Moreover, although the removal statute forbids a defendant from removing a case to federal court on the basis of diversity jurisdiction if the defendant is a citizen of the state where the action is pending, *see* 28 U.S.C. § 1441(b), the rule that an executor or administrator of an estate is deemed to be a citizen *only* of the state in which the decedent was a citizen is applicable here as well. 28 U.S.C. § 1332(c)(2). Because Executor is treated as a State A citizen, removal was appropriate.

Point Two(a) (15–25%)

A default judgment is entitled to preclusive effect, subject only to the requirements that the rendering court had subject matter jurisdiction and personal jurisdiction over the defendant and that the defendant had notice of the action and an opportunity to appear and defend himself. Those requirements are met here.

A default judgment rendered by a court is entitled to preclusive effect so long as the court had subject matter and personal jurisdiction over the action and the parties. *See Sewell v. Merrill Lynch*, 94 F.3d 1514 (11th Cir. 1996); *Orca Yachts LLC v. Mollicam Inc.*, 287 F.3d 316, 318 (4th Cir. 2002). Although Bert did not appear and defend himself in the original action, the federal court clearly had jurisdiction over the action and over Bert. The parties were diverse (Bert was from State B and Al from State A) and the amount in controversy (the value of Al’s automobile) exceeded \$75,000. Moreover, as Bert was a citizen of the state in which the action was pending,

and was domiciled in the state at the time, the court had personal jurisdiction over him. The facts also state that Bert was properly served and had notice of the action.

Point Two(b) (25–35%)

The judgment in the prior suit between Al and Bert precludes Bert from asserting his personal injury claim because that claim was a compulsory counterclaim that should have been raised in the original action.

Because the judgment in Al’s suit against Bert was rendered by a federal court sitting in diversity, its judgment will be given the same preclusive effect as would be given under State B law to a State B state court judgment (because State B is the state in which the judgment-rendering court was located). *See Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001). The precise preclusive effect that should be given to a default judgment is subject to some variance among the states, *see, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 22 and comments (1982), but on this issue there is substantial uniformity. It is widely accepted that a default judgment bars the losing party from asserting defenses that could have been raised in the action or claims that were subject to a compulsory counterclaim statute or rule in the original action. *See generally* 3 MOORE’S FEDERAL PRACTICE § 13.14 (3d ed.).

The federal compulsory counterclaim rule, Federal Rule of Civil Procedure 13(a), would have required Bert to bring his claim against Al in the first action, had Bert actually defended that action. Rule 13(a) requires a defendant to “state as a counterclaim any claim” that he or she has against the plaintiff if the claim “arises out of the transaction or occurrence that is the subject matter” of the plaintiff’s claim. Here, Bert’s claim against Al for damages arises out of the same occurrence (the traffic accident) as Al’s previous claim against Bert. Moreover, key issues of law and fact raised by both claims would be the same as both claims involve the basic question of who was at fault in the accident. Much of the evidence that would support or refute Al’s claim against Bert is likely to be relevant to Bert’s claim against Al. In short, the two claims are logically, factually, and transactionally related. These are precisely the circumstances under which the federal rules require Bert to assert his claim as a counterclaim. *See generally Tank Insulation Int’l, Inc. v. Insultherm, Inc.*, 104 F.3d 83, 85–86 (5th Cir. 1997). Because Bert’s claim for damages was a compulsory counterclaim that should have been raised in the original action, the judgment in that original action bars the claim. It does not matter that Bert did not actually litigate in the prior case but merely allowed a default judgment to be entered against him.

[NOTE: Because the question of the preclusive effect of this judgment involves the effect of the federal counterclaim rule, some applicants might argue that the preclusion issue is governed by federal law and not by state preclusion rules. *Cf. Semtek*, 531 U.S. 497, 508 (state law governs the preclusive effect of a diversity judgment *absent substantial federal concern*). But it does not really matter whether an applicant concludes that state or federal preclusion rules apply. The basic rule—that a default judgment bars the defendant from raising in future litigation a claim that was subject to a compulsory counterclaim statute or rule in the original litigation—is well established in state and federal practice.]

FAMILY LAW III.D., E., I., J.

ANALYSIS

- Legal Problems:
- (1)(a) Does Husband's conduct provide a basis for setting aside the divorce settlement agreement?
 - (1)(b) Does Mediator's conduct provide a basis for setting aside the divorce settlement agreement?
 - (2) Is Wife entitled to spousal maintenance?

DISCUSSION

Summary

A spouse's fraud, duress, or coercive behavior provides a basis for setting aside a settlement agreement that is unfair. In this case, there is evidence to support findings of unfairness and impermissible misconduct by Husband. Additionally, a mediator's substantial misconduct is a basis for setting aside a settlement agreement. Such substantial misconduct is clearly evident in this case. Wife has a strong spousal maintenance claim given her disproportionate contributions to the marriage and to Husband's education, the substantial disparity in Husband's and Wife's economic circumstances, and the duration of the marriage.

Point One(a) (15–25%)

A divorce settlement agreement may be set aside when a spouse's fraud, duress, or coercive behavior results in an unfair agreement. Husband's collusion with Mediator, his implicit threats against Wife, and his failure to disclose his relationship with Mediator provide a basis for setting aside the settlement agreement.

When a divorce settlement agreement is attacked before a final judgment of divorce is entered, the court generally "has great freedom . . . to reject the agreement, to accept it, or to accept it with modifications." HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 760 (2d ed. 1988). Although the case law is far from uniform and often relies heavily on the facts of the case at hand, courts in most states have held that an agreement may be set aside based on fraud, duress, or coercive behavior that results in an agreement substantively unfair to one of the parties. *See id.* at 761; UNIF. MARRIAGE AND DIVORCE ACT (UMDA) § 306(b) (1982) (written separation agreement is binding on the court unless unconscionable).

Courts have been particularly solicitous of divorce litigants who are unrepresented by legal counsel. Even when there is no general duty of disclosure, a number of courts have held that when negotiating a separation agreement, a represented spouse has a fiduciary obligation toward an unrepresented spouse. *See, e.g., Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 2002). Although lack of independent legal counsel will not by itself invalidate an agreement, courts will generally

examine the circumstances that led to the waiver of counsel. Moreover, an attorney may not ethically represent both spouses in drafting an agreement.

Here, Wife had no attorney before the mediation session, while Husband met with Mediator, an attorney who had represented his family for many years. Husband also failed to tell Wife about that meeting and his family's relationship with Mediator. Taken together, these facts may establish that the agreement was procured through fraud. Husband's collusion with Mediator to pressure Wife into signing an agreement favoring his interests also appears to be coercive; so does Husband's fist-clenching and "menacing" look.

Husband's behavior thus offered the trial court a basis for invalidating the settlement agreement if that agreement was substantively unfair to Wife. Because, in most states, there are strong arguments in favor of a spousal maintenance award to Wife (*see* Point 2), the trial court would be justified in finding that the agreement was substantively unfair.

[NOTE: Cases refusing to invalidate fraudulently obtained settlement agreements that already have been incorporated into a divorce judgment are inapplicable to this fact pattern. *See, e.g., Daffin v. Daffin*, 567 S.W.2d 672 (Mo. Ct. App. 1978); *Hewett v. Zegarzewski*, 368 S.E.2d 877 (N.C. Ct. App. 1988).]

Point One(b) (15–25%)

A divorce settlement agreement may be set aside based on serious mediator misconduct. Because Mediator was guilty of such misconduct, the trial court would not err in setting the agreement aside.

Substantial mediator misconduct is a basis for setting aside a divorce settlement agreement. *See Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fl. Ct. App. 2001). In this case, Mediator was guilty of serious misconduct. First, a mediator must be impartial and disclose potential conflicts of interest. *See ABA Model Standards of Practice for Family and Divorce Mediation*, Standard IV, 35 FAM. L.Q. 27 (2001) (mediator must "conduct the mediation process in an impartial manner" and "disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator"). In this case, a number of facts suggest bias: Mediator was the attorney for Husband's family and met with Husband prior to the mediation session; Mediator failed to reveal these sources of bias and showed partiality toward Husband by requesting only his proposal. Second, a mediator is required to explain the mediation process and make sure that the parties have enough information to ensure informed decision making. *See id.* at Standard III ("mediator shall facilitate the participants' understanding of what mediation is"). In this case, Mediator did not explain the mediation process, the law, or the parties' entitlement to independent counsel. Third, a mediator should recognize and control a situation, such as domestic violence, that would result in unfairness or prejudice to one of the parties. *See id.* at Standard X ("mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly"). Here, Mediator did not screen for domestic violence and did nothing to adjust the power imbalance between Husband and Wife. Fourth, a mediator may not coerce or improperly influence any party to make a decision. *See id.* at Standard I ("mediator shall recognize that mediation is based on the principle of self-determination by the participants"); *Vitakis-Valchine*, 793 So. 2d at 1099. Here, Mediator characterized Husband's proposal as "fair" and failed to ask Wife what she would propose as a settlement.

Mediator's misconduct offered the trial court another, independent basis for setting aside the settlement agreement.

Point Two (40–50%)

Wife has a strong claim to spousal maintenance given her disproportionate contributions to the marriage and to Husband's education, the substantial disparity in Husband's and Wife's economic circumstances, and the duration of the marriage.

Rules governing the award of spousal maintenance vary from one state to the next, but they almost invariably require the trial court to consider the parties' financial resources and needs, the marital contributions, and the marital duration. Some state statutes require consideration of spousal misconduct. Some require the court to consider one spouse's support for the other's education or training or mandate reimbursement for such contributions. *See* Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23 (2001) (describing and categorizing factors in determination of spousal maintenance). Spousal maintenance statutes also accord substantial discretion to the trial court.

In this case, Husband's salary will soon be five times that of Wife, and his economic prospects are extremely good. Wife is minimally educated and relatively unskilled; her economic prospects are extremely poor. The marriage lasted eleven years. During that time, Wife made greatly disproportionate economic and noneconomic contributions to the marriage, Wife greatly facilitated Husband's medical training, and Husband was consistently abusive to Wife.

In the vast majority of states, this combination of facts would amply support a spousal maintenance award to Wife during the three-year period needed to complete her college education. Given Husband's anticipated \$150,000 annual salary, Wife's earning capacity (apparently no greater than \$30,000 per year), and her likely inability to work full time while attending college, a \$25,000 spousal maintenance award also seems to be fully justified.

In some states, however, a spouse must establish that she lacks the capacity for self-support as a precondition to obtaining a spousal maintenance award. *See, e.g.*, UMDA § 308(a) (court may not award spousal maintenance unless spouse (1) "lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment"). Wife has no property, but she is capable of self-support. Under a standard like that of the UMDA, she would be ineligible for spousal maintenance unless her employment was not "appropriate." Some courts have thus refused to award spousal maintenance to a wife capable of self-support even when she supported her husband's professional education. *See, e.g., McDermott v. McDermott*, 628 P.2d 959 (Ariz. Ct. App. 1981) (schoolteacher wife who supported husband through graduate school not eligible for spousal maintenance because she could support herself); *Morgan v. Morgan*, 383 N.Y.S.2d 343 (App. Div. 1976) (overturning spousal maintenance award to wife who had supported husband's legal education and planned to finish college and go to medical school because she was capable of self-support).

Decisions denying spousal maintenance on facts like those in the problem are typically quite old, however. Today, courts and commentators tend to view spousal maintenance as compensation for loss rather than relief of need. *See Principles of the Law of Family Dissolution: Analysis*

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and Recommendations § 5.04 et seq., A.L.I. (2002) (treating spousal maintenance as a remedy for “unfair loss allocation”). Some jurisdictions also employ a quasi-contract or unjust enrichment approach. The problem contains facts that would support this type of argument given that Husband and Wife both expected to benefit from Husband’s enhanced earning capacity.

Even in a jurisdiction with case law strongly emphasizing self-support, Wife could rely on the fact that she and Husband had an understanding that she would return to school after his education was completed. *See Morgan*, 383 N.Y.S.2d at 344 (basing denial of spousal maintenance in part on fact that wife’s current educational plan was “never in the contemplation of the parties during marriage”). That agreement would also provide Wife with an argument that her current employment is inappropriate.

[NOTE: The applicant’s conclusion should be given less weight than his or her command of the relevant legal principles and use of the facts.]

AGENCY & PARTNERSHIP V.A.; VI.; VII.B.

ANALYSIS

- Legal Problems:
- (1) What is the legal relationship of Talker, Fixer, and Manager?
 - (2)(a) Did Fixer have actual authority to hire Crafty on behalf of TFM?
 - (2)(b) Did Fixer have apparent authority to hire Crafty on behalf of TFM?
 - (3) Can Crafty hold Talker personally liable for unpaid wages?

DISCUSSION

Summary

Talker, Fixer, and Manager are doing business as a general partnership. As partners in a general partnership, they must ordinarily act by majority rule; thus Fixer had no actual authority to hire Crafty. However, Fixer had apparent authority to hire Crafty on behalf of the partnership. Therefore, TFM is liable for Crafty's unpaid wages. As a general partner, Talker is personally liable for the partnership's debts. However, Crafty can collect those wages from Talker only if Crafty obtains a judgment against Talker and first exhausts the partnership's assets.

Point One (20–30%)

Talker, Fixer, and Manager are general partners in TFM.

A partnership is the association of two or more persons to carry on as co-owners a business for profit whether or not the persons intend to form a partnership. *See* UNIF. PARTNERSHIP ACT (UPA) §§ 101(6) & 202(a) (1997); *cf. also* UPA § 6(1) (1914) (defining partnership in same manner as UPA (1997)). “A business is a series of acts directed toward an end.” UPA § 202 cmt. 1 (1997). As co-owners of a business, each partner “has the power of ultimate control.” *Id.*

In order to create a partnership, the parties must intend to take actions that create a partnership, but it is not necessary that they realize they are forming a partnership or describe their business as a partnership. “[W]here intent cannot be directly ascertained, it must be established from all of the facts, circumstances, actions, and conduct of the parties.” *MacArthur Co. v. Stein*, 934 P.2d 214, 217–18 (Mont. 1997). A written agreement is generally not required.

A person who receives a share of the profits of the business is presumed to be a partner in the business. UPA § 202(c)(3) (1997); *cf. UPA* § 7(4) (1914) (receipt of a share of profits of a business is prima facie evidence that one is a partner in the business). The presumption does not apply in specified situations, such as where the profits are received in payment of a debt, as interest on a

loan, as wages, as rent, or for the sale of the goodwill of a business. *See* UPA § 202(c)(3)(i)–(vi) (1997); *cf.* UPA § 7(4)(a)–(e) (1914) (providing similar exceptions).

Here, there is a for-profit business and the three friends share equally in the profits of the business. There are no facts suggesting that the profits are received in payment of a debt, as interest on a loan, as wages, as rent, or for the sale of the goodwill of a business. Furthermore, the conduct of Talker, Fixer, and Manager supports the partnership presumption: each of them participates in the business on a regular basis; they meet regularly to discuss the business; and the name of the business includes initials from each of their names.

In sum, although there is no written partnership agreement, the conduct of Talker, Fixer, and Manager establishes that they have associated as co-owners of a business for profit. This association constitutes a partnership relationship. Because they have no agreement to the contrary, they have created a general partnership.

Point Two(a) (5–15%)

Fixer had no actual authority to bind the partnership to a contract of employment with Crafty.

Absent an agreement to the contrary, “[a] difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners.” UPA § 401(a)(j) (1997); *see also* UPA § 18(h) (1914) (providing same rule as UPA (1997)). An act outside of the ordinary course of business requires the consent of all partners. UPA § 401(a)(j) (1997).

Hiring an employee to perform services in the partnership business is clearly a matter within the ordinary course of the business of the TFM partnership. No major change in or deviation from the cabinet restoration business is involved. Fixer was merely hiring additional help to deal with an overflow of business. *See State Comp. Ins. Fund v. Indus. Acc. Comm’n*, 82 P.2d 732, 734 (Cal. Ct. App. 1938) (general rule is that each partner has authority to bind the firm by employment of persons whose services are reasonably necessary for carrying on business); *Felice v. Felice*, 112 A.2d 581, 583 (N.J. Super. A.D. 1955) (partner can bind firm by engaging employees in ordinary course of business).

The facts of this problem make clear that a majority of the partners (two of the three) opposed the hiring of Crafty. Consequently, Fixer did not have actual authority to hire Crafty.

Point Two(b) (20–30%)

Fixer had apparent authority as a partner to bind the partnership when he hired Crafty.

Each partner has authority to bind the partnership by any act “for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership . . . unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.” UPA § 301(1) (1997); *see also* UPA § 9(1) (1914) (very similar to UPA (1997)). The effect of UPA § 301(1) (1997) is to “characterize a partner as a general managerial agent having both actual and apparent authority co-extensive with the firm’s ordinary business, at least in the absence of a contrary partnership agreement.” UPA § 301 cmt. 2 (1997).

Under UPA (1997), a two-part analysis is required. First, it must be determined whether the particular act was “for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership.” *Id.* If it was, then the partnership is liable unless it is proven that the person dealing with the partner had actual knowledge or notification of the partner’s lack of authority. *See RNR Inv. Ltd. P’ship v. Peoples First Cmty. Bank*, 812 So. 2d 561, 565–66 (Fla. Ct. App. 2002).

Here, hiring Crafty to help in cabinet restoration was in the ordinary course of a cabinet restoration business. *See Point Two(a).*

Therefore, the partnership will be bound unless it is proved that Crafty had known that Fixer lacked authority to hire Crafty, in which case Crafty would have no claim. The facts of the problem do not suggest that Crafty had knowledge of Fixer’s lack of authority; therefore, Fixer had apparent authority as a partner to bind the partnership by hiring Crafty because the act appeared to be in the ordinary course of the partnership business.

[NOTE: The result under the 1914 version of UPA would be the same. *See UPA § 9(1) (1914).*]

Point Three (15–25%)

Talker is personally liable for Crafty’s unpaid wages. However, to collect against Talker, Crafty must first obtain judgments against Talker and the partnership and exhaust the assets of the partnership.

A partner is jointly and severally liable for all obligations of the partnership. *See UPA § 306(a) (1997)*. As discussed above, Fixer had apparent authority as a partner to bind the partnership to an employment contract with Crafty. Therefore, the unpaid wages are a partnership obligation for which Talker is jointly and severally liable.

However, to collect from Talker personally, Crafty must first obtain a judgment against Talker and against the partnership and levy execution against the partnership’s assets. Ordinarily, a claimant may not take action against a partner’s personal assets unless the partnership assets fail to satisfy the claimant’s judgment. *See UPA § 307(d) (1997)*. Moreover, under the UPA (1997), a judgment against a partnership is not, by itself, a judgment against a partner. Consequently, a judgment against a partnership may not be satisfied out of the partner’s separate assets unless there is also a separate judgment against the partner. *See id.* § 307(c). However, a judgment against a partner personally may be sought in the same action as a judgment against the partnership.

In sum, the unpaid wages are a partnership obligation. Therefore, Crafty can execute against the separate assets of Talker to satisfy the claim for unpaid wages only if Crafty obtains a judgment against Talker as well as obtaining a judgment against the partnership and exhausting its assets.

[NOTE: Under the UPA (1914), a partner is jointly, as opposed to jointly and severally, liable for obligations of the partnership. *See UPA § 15(b) (1914)*. Consequently, all partners must be joined as defendants in an action based upon a partnership contract unless a statute permits otherwise. *See generally* WILLIAM GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 207(A)–(C) (West 3d ed. 2001). Moreover, a partnership is not a legal entity under the UPA (1914). Therefore, a third party cannot sue the partnership and is required to sue all the individual partners unless a statute

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permits a suit against the partnership as an entity. *See id.* While the UPA (1914) does not require exhaustion of partnership assets prior to execution upon the separate assets of a partner, case law in a number of UPA jurisdictions imposes such a requirement. *See id.* § 207(E).]

CRIMINAL LAW I.B.1., 2.; IV.B.1., D.

ANALYSIS

- Legal Problems:
- (1) Did Defendant act with the *mens rea* sufficient to be found guilty of second-degree murder?
 - (2) Was Defendant's accidental shooting of Friend the legal cause of Friend's death?

DISCUSSION

Summary

Defendant need not have acted with deliberation or premeditation to be guilty of second-degree murder. However, Defendant must have acted with the *mens rea*, or mental state, of "malice aforethought." Malice aforethought is present when a defendant acts with "depraved indifference to the value of human life." On these facts, a jury could conclude that Defendant's act of shooting at a lamp to "scare Friend" evidenced a disregard of the risks to Friend and of the value of Friend's life sufficient to amount to depraved indifference.

Defendant's act of shooting Friend was the legal cause of Friend's death. First, it was the "but for" cause of Friend's death. Had Friend not been shot, Defendant would not have been driving him to the hospital, there would have been no accident, and Friend would not have bled to death. The fact that the accident contributed to Friend's death does not relieve Defendant of liability. The accident occurred as a result of Defendant's response to the shooting and would not be held to break the chain of causation. Thus, if Defendant were found to have acted with the requisite *mens rea*, Defendant would be responsible for Friend's death and guilty of second-degree murder.

Point One (45–55%)

A jury could find that Defendant's act of shooting at a lamp to scare Friend evidenced an extreme indifference to the value of human life and thus conclude that Friend acted with "malice aforethought."

To be guilty of second-degree murder, Defendant must have acted with the requisite *mens rea*, or mental state, of malice aforethought. Malice aforethought is a term of art, and it encompasses several different mental states. In most jurisdictions, the malice aforethought requirement is satisfied if Defendant acted with intent to kill, with knowledge that his acts would kill, with intent to inflict great bodily harm, or with reckless disregard of an extreme risk to human life (a depraved heart). J. DRESSLER, UNDERSTANDING CRIMINAL LAW 512–13 (2001); see MODEL PENAL CODE § 210.2(1)(b).

In this case, the evidence does not suggest that Defendant acted with intent or knowledge that Friend would be harmed. However, the evidence probably does support a conclusion that

Defendant acted with “a depraved heart” and therefore with the malice aforethought necessary for Defendant to be guilty of murder.

Although the precise terminology used to describe “depraved-heart” murder differs from jurisdiction to jurisdiction, most states require (i) that the defendant act “recklessly” (i.e., with an awareness of the risk that his acts could cause death) and (ii) that the defendant’s conduct show a high degree of indifference to the value of human life. Thus, convictions for depraved-heart murder have been upheld when a defendant intentionally shot a gun into a crowded room, *People v. Jernatowski*, 144 N.E. 497 (N.Y. 1924), or played Russian roulette with a partially loaded revolver, *Commonwealth v. Malone*, 47 A.2d 445 (Pa. 1946).

Here, Defendant probably acted recklessly. Defendant shot a gun in the general direction of Friend, while aiming at a lamp that was behind Friend. This behavior carried an obvious risk to Friend: if Defendant’s aim was slightly off or if Friend moved (as happened here), Friend could be shot and fatally injured. From the facts of Defendant’s behavior, and the obvious risks attending that behavior, a jury could infer that Defendant must have been aware of those risks and thus acted recklessly.

Did Defendant’s recklessness evidence an “extreme indifference to the value of human life”? Courts have held that behavior that carries a substantial risk of causing death, when it has no legitimate purpose and is done solely for the amusement of a defendant, is a sufficient predicate for a conclusion that the defendant acted with the necessary indifference to human life to be liable for depraved-heart murder. *See Malone*, 47 A.2d 445. Here Defendant ran a high risk of causing serious harm to Friend for no purpose other than to amuse himself by scaring Friend. This is the kind of behavior that provides a sufficient predicate for a jury to find “extreme indifference to the value of human life” and to convict Defendant of second-degree murder.

Point Two (45–55%)

Defendant’s act of shooting Friend was the legal cause of death because Friend would not have died “but for” having been shot by Defendant, and the injuries suffered by Friend in the car accident do not break the chain of proximate causation.

Defendant is criminally liable for Friend’s death only if Defendant’s acts were both the actual and proximate cause of Friend’s death. *See generally* WAYNE R. LAFAVE, CRIMINAL LAW 331–358 (4th ed. 2003).

Defendant’s act of shooting Friend was the actual cause of Friend’s death. First, Defendant’s act was the “but for” cause of Friend’s death. Had Defendant not shot Friend, they would not have been driving to the hospital, the accident would not have occurred, and Friend would not have bled to death. Quite apart from that, however, it is well established that where a defendant’s wrongful act (the gunshot wound) works in combination with some other cause (the injuries in the accident) to cause a victim’s death, the defendant’s act is an actual cause of the death because it “accelerated the death process.” DRESSLER, *supra*, at 185; *see also Oxendine v. State*, 528 A.2d 870 (Del. 1987) (defendant who inflicts a second nonmortal wound can be considered the cause of child’s death only if his actions caused child to die sooner than he otherwise would). Here, the facts state that Friend’s death was the result of loss of blood caused by *both* the gunshot wound and the automobile accident. In that case, the gunshot wound is an actual cause of death.

Defendant's acts were also the proximate cause of Friend's death. The accident was a "dependent intervening cause"—a consequence of Defendant's prior wrongful conduct. It is widely held that such an intervening cause breaks the chain of causation from the original act to the death only if the intervening force was "so out-of-the-ordinary that it is no longer fair to hold [the defendant] criminally responsible for the outcome." DRESSLER, *supra*, at 190. Courts routinely say that the intervening event must have been "abnormal or bizarre" to prevent a defendant's original action from being regarded as the proximate cause of death. *See Kibbe v. Henderson*, 534 F.2d 493, 498-99, n.6 (2d Cir. 1976), *rev'd on other grounds, Henderson v. Kibbe*, 431 U.S. 145 (1977). Here, there is nothing abnormal about Defendant's response to his wrongful act (he tried to rush Friend to the hospital). Nor is there anything abnormal or bizarre about the fact that Defendant was involved in an accident while rushing to the hospital with a wounded friend. Even if Defendant was not at fault in causing the accident, the fact that it occurred is not sufficiently "out-of-the-ordinary" to warrant breaking the chain of causation from the shooting to the death. Therefore, Defendant's act of shooting Friend was the legal cause of Friend's death, and Defendant is guilty of second-degree murder if that act was committed with malice aforethought (*see* Point One).

REAL PROPERTY V.A., B.2., D.1.d.

ANALYSIS

- Legal Problems:
- (1) Did Owen convey a fee simple absolute to Abe by the Owen-to-Abe deed?
 - (2) Did Abe acquire title to Whiteacre by adverse possession?
 - (3) Did Buyer acquire title from Doris that was superior to Abe's title?

DISCUSSION

Summary

A valid deed requires that the grantee be named with specificity. Because the Owen-to-Abe deed did not name a grantee, it was ineffective to convey the land to Abe. Although Abe did not acquire title to Whiteacre by deed from Owen, he may have acquired title by adverse possession. This would depend on whether the court finds that Abe's acts were sufficiently open, notorious, exclusive, continuous, and under claim of right to warrant the conclusion that he had acquired title by adverse possession. If Abe acquired title to Whiteacre by adverse possession, his claim to possession is good against a subsequent purchaser for value like Buyer. If Abe did not acquire title by adverse possession either because an applicant wrongfully believes the Owen-to-Abe deed was valid or because Abe's acts are construed as insufficient to acquire a title by adverse possession, then Buyer's deed is controlling because he is a bona fide purchaser for value and had neither constructive nor inquiry notice of Abe's interest in Whiteacre.

Point One (25–35%)

Abe did not acquire title to Whiteacre by deed from Owen because that deed failed to specify the name of the grantee.

To be valid, a deed must identify the buyer and the seller, describe the land subject to the conveyance, contain words denoting a present intent to convey, and be signed by the grantor. *See generally* STOEBUCK & WHITMAN, *THE LAW OF PROPERTY* 810 (3d ed. 2000). Here, the deed from Owen to Abe read in its entirety: "Owen hereby conveys to the grantee by a general warranty deed that parcel of vacant land in State B known as Whiteacre. [Signature of Owen]." The Owen-to-Abe deed names the seller, describes the land, sets forth a present intent to convey to a grantee, and contains the grantor's signature, but it does not contain the name of the grantee. Therefore Owen did not effectively convey the land to Abe. Although some courts have upheld deeds when the grantee's name is missing, these cases involve deeds containing language providing a method for ascertaining the grantee's identity, such as "to the grantor's son" or to the "trustee of a trust." No such language appears here.

[NOTE: If an applicant does not know the rule that a deed must name the grantee, the applicant should conclude that the Owen-to-Abe deed is valid. If the applicant wrongly concludes that the deed is valid, then the applicant might either completely skip Point Two, or, in discussing Point Two, conclude that Abe did not acquire a title by adverse possession because Abe's possession was not hostile.]

Point Two (35–45%)

Abe may succeed in establishing that he acquired title to Whiteacre by adverse possession.

An individual may acquire title to land by adverse possession. To do so, the claimant must show that he entered the land and remained in actual possession that was open, continuous, exclusive, and under claim of right during the entire period in which the record owner (here, Owen) had a cause of action for possession. In State B, a cause of action for possession is available for 10 years after a possessor's entry.

Whether the possessor has acquired title by adverse possession can only be conclusively determined by a judicial proceeding, and the sufficiency of particular acts of possession is not always clear. In most states, it is not necessary that the possessor have paid taxes. *See* STOEBUCK & WHITMAN, *supra*, at 854. (In a few states, a possessor cannot claim title by adverse possession without paying taxes. *Id.* at n.7.) The possessor need not possess the land to its highest and best use; the possession must be consistent with how a true owner would have possessed the land. *See Jarvis v. Gillespie*, 587 A.2d 981, 985 (Vt. 1991).

Abe has a strong case for adverse possession. His acts of possession were open in the sense that they were observable by anyone who looked. They continued for 11 years. His grants to others of permission to use the land suggest exclusivity. He paid taxes, although in most states this is not essential to establish a title by adverse possession. Lastly, his claim of right or hostility is evidenced by his entry under an invalid deed. It is irrelevant that he thought he was there rightfully under a valid deed because, in fact, the deed was invalid, and Owen could have ejected him at any time during the 10-year statutory period. Abe's acts of possession endured for 11 years, one year more than required to acquire a title by adverse possession in State B. His possession was also more active than Owen's, supporting the claim that it was consistent with how a true owner would have possessed the land. The fact that Abe did not build structures on the land, fence it, or post no-trespassing signs should not adversely affect his claim given that Owen, the previous owner, appears to have acted in the same way.

[NOTE: An applicant's conclusion is less important than his or her demonstrated mastery of the relevant legal principles and ability to utilize the facts.]

Point Three (30–40%)

If Abe acquired title to Whiteacre by adverse possession, his claim to possession is good against a subsequent purchaser for value like Buyer despite his failure to record his interest. If Abe did not acquire title by adverse possession, Buyer's deed is controlling because Buyer had neither actual nor constructive notice of Abe's interest in Whiteacre when he purchased the property.

If Abe acquired title by adverse possession, that title is as good as a title traceable to a prior record owner; it is not lost because he allowed the property to go unoccupied. Thus if Abe acquired title by adverse possession (*see* Point Two), he is entitled to recover possession from Buyer.

The State B recording statute does not alter this result. Under the statute, a subsequent bona fide purchaser prevails against a prior donee or purchaser if the purchaser acquired the property without knowledge of the interest of the prior donee or purchaser. Statutes like this aim to protect subsequent purchasers against interest holders who could—but have failed to—record the documents describing their interests in the local land records office. In such a case, equity clearly favors the subsequent purchaser who took without notice of the prior interest. However, in the case of title acquired by adverse possession, there is no document that the interest holder could record. Courts have thus held that title acquired by adverse possession cannot be defeated by a later conveyance from the prior record title owner even if the land is vacant at the time the buyer purchases the land. *See, e.g., Mugaas v. Smith*, 206 P.2d 332 (Wash. 1949).

If Abe did not acquire title by adverse possession, then Buyer acquired title to the property from Doris, Owen's successor-in-interest. In that case, Buyer is entitled to possession because, given Abe's absence at the time Buyer purchased the property, Buyer had no actual or constructive notice of Abe's interest in the land.

NEGOTIABLE INSTRUMENTS IV.A., B., D.; V.B.

ANALYSIS

- Legal Problems:
- (1) Under what circumstances would Lender take the check free from Corporation's claim of ownership?
 - (2) Was Sam's fraudulent indorsement effective to negotiate the check to Lender and make Lender a holder?
 - (3) Did Lender give value for the check merely by reducing Sam's loan balance?
 - (4) Did Lender have notice of Corporation's claim to the check when it took the check in payment of a personal debt owed by Sam?

DISCUSSION

Summary

Lender will not be subject to Corporation's claim to the check because Lender is a holder in due course. Sam's forged indorsement of the check is treated as valid (as against Corporation) because Corporation gave Sam responsibility for handling its checks. Lender took the indorsed check in good faith. It also gave "value" for the check because it took it in payment for an antecedent debt. Finally, Lender had no notice of Corporation's claim to the check or of any other claim or defense that might be raised. Lender is therefore not obligated to return the check to Corporation.

[NOTE: The Uniform Commercial Code (UCC) governs this problem. The American Law Institute and National Conference of Commissioners on Uniform State Laws approved a revision of UCC Article 1 in 2001 and approved amendments to UCC Article 3 in 2002 and 2003. This discussion cites the current revised and amended versions of these articles, but the problem has been designed so that the amendments do not affect the analysis.]

Point One (20–30%)

Lender will be free of Corporation's claim if Lender took the check under circumstances that satisfy the requirements for being a holder in due course.

A check is a negotiable instrument, UCC § 3-104(f), and a "person taking an instrument . . . is subject to a claim of a property or possessory right in the instrument." UCC § 3-306 (2003). In this case, Corporation was the original payee of the check, the check belonged to Corporation, and Corporation therefore has both a property and possessory right in the check. In most cases, Corporation would be able to assert this right and recover the check from a thief (e.g., Sam) or from a person who took the instrument from a thief (e.g., Lender).

However, a “claim of a property or possessory right in the instrument” may not be successfully asserted against a “person having rights of a holder in due course.” *Id.* Therefore, if Lender is a holder in due course of the check, Lender will not be subject to Corporation’s claim to the check. *See American Parkinson Disease Ass’n, Inc. v. First Nat. Bank of Northfield*, 584 N.W.2d 437, 441 (Minn. 1998) (holder in due course not subject to the claim of an organization from which the check was embezzled).

A “holder in due course” is a holder of a negotiable instrument who took the instrument in good faith, for value, and without notice of certain problems with respect to the instrument, including a claim to the instrument. UCC § 3-302(a)(2). The question stipulates that Lender took the check in good faith. Accordingly, whether Lender is a holder in due course depends on whether Lender is a holder of the check, whether Lender took the check for value, and whether Lender had notice of Corporation’s claim to the check. The following points address these issues, ultimately concluding that Lender is a holder in due course.

Point Two (30–40%)

Lender is a holder of the check because a fraudulent indorsement of a check by an employee entrusted with responsibility with respect to the check is effective to negotiate the check.

Lender must be a “holder” of the check in order to be a holder in due course. A person can become a holder of a negotiable instrument by taking the instrument through the process of negotiation. *See* UCC § 1-201(b)(21)(A) (defining holder), § 3-201(a) (defining negotiation). Negotiation of an instrument payable to an identified person requires a transfer of possession of the instrument and the indorsement of the person to whom the instrument is payable. UCC § 3-201(b). In this case, the check was payable to Corporation, and possession was transferred to Lender. Therefore, if the check was indorsed by Corporation, Lender took the instrument through a negotiation and became a holder of the instrument.

Sam made an unauthorized indorsement of the check in the name of Corporation. Ordinarily, an unauthorized signature would not suffice to negotiate a check. UCC § 3-403(a). But an exception exists for unauthorized signatures made by an employee entrusted with responsibility for handling checks. The exception says: “if an employer entrusted an employee with responsibility with respect to the instrument and the employee . . . makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person.” UCC § 3-405(b). An employer may entrust an employee with responsibility with respect to a check in several ways, including giving the employee authority to handle the check “for deposit to an account.” UCC § 3-405(a)(3)(ii); *see Cable Cast Magazine v. Premier Bank, Nat’l Ass’n*, 729 So. 2d 1165, 1167 (La. Ct. App. 1999) (holding that a fraudulent indorsement by an employee who had authority to deposit checks was effective as the indorsement of the employer).

In this case, Corporation entrusted Sam with responsibility for the check because it authorized him to deposit it. Sam made a fraudulent indorsement of the check in the name of Corporation. This fraudulent indorsement therefore was effective as the indorsement of Corporation. Accordingly, the check was negotiated to Lender, and Lender became a holder of the check. The underlying policy is that the risk of unauthorized indorsement should fall upon Corporation because Corporation put Sam in a position that facilitated his commission of a forgery. Section 3-405(b)

treats the fraudulent indorsement as effective only as to a person who took the instrument for value and in good faith. For a discussion of the value issue, see Point Three.

[NOTE: The facts stipulate that Lender took the instrument in good faith. Although the question asks only whether Lender must return the check to Corporation, some applicants might note that any loss caused by this fraud must be shared by Lender if Lender “fail[ed] to exercise ordinary care in . . . taking the instrument and that failure substantially contribute[d] to [the] loss” UCC § 3-405(b).]

Point Three (15–25%)

An instrument is taken for value if it is taken in payment of an antecedent debt.

In order to be a holder in due course, Lender must have taken the check for “value.” UCC § 3-302(a)(2)(i). Section 3-303(a)(3) says that “[a]n instrument is issued or transferred for value if . . . the instrument is issued or transferred as payment of . . . an antecedent claim against any person, whether or not the claim is due.” In this case, Lender took the \$3,000 check in payment of Sam’s antecedent mortgage debt. Therefore, even though Lender may not have given anything tangible to Sam, Lender still took the check for value. *See Fedeli v. UAP/Ga. Ag. Chem., Inc.*, 514 S.E.2d 684, 690 (Ga. Ct. App. 1999) (holding that a lender who took checks in payment of an existing indebtedness gave “value” for the checks).

Point Four (15–25%)

Lender did not have notice of Corporation’s claim to the check.

To be a holder in due course, Lender must take the check without notice of any claim to the check. UCC § 3-302(a).

The system of negotiability of checks presumes that checks will be transferred in payment of obligations by persons other than the original payees of the checks. Thus, there is nothing inherently suspicious about a person transferring an indorsed check that was not originally payable to that person. Indeed, the holder-in-due-course rule is designed to encourage persons and businesses like Lender to accept and transfer checks in this manner.

Lender had no knowledge of Sam’s fiduciary status; therefore, Lender cannot be charged with knowledge of Sam’s breach of a fiduciary duty. *Cf.* UCC § 3-307(b)(2) (notice of certain acts constituting breach of fiduciary obligation gives notice of represented person’s claim only where person taking an instrument from a fiduciary “has knowledge of the fiduciary status”). *See Jelmoli Holding, Inc. v. Raymond James Financial Serv., Inc.*, 470 F.3d 14, 19 (1st Cir. 2006) (“plaintiff must show knowledge by the taker, and not just warning clues, that the person tendering the check is a fiduciary”); *United Catholic Parish Schools of Beaver Dam Educ. Ass’n v. Card Serv. Ctr.*, 636 N.W.2d 206, 212–213 (Wis. Ct. App. 2001) (holding that the taker of an unauthorized check in payment of a personal debt did not have notice of a breach of a fiduciary duty because it did not have actual knowledge of any fiduciary relationship).

Thus, Lender is a holder in due course. It is a holder. It took the instrument in good faith and for value. And it did not have notice of Corporation’s claim to the instrument even though Sam

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was using the check to pay a personal debt. As a holder in due course, Lender is not subject to Corporation's claim to the check.

[NOTE: Credit should be given for a reasonable discussion of the notice issue, regardless of the conclusion reached by the applicant.]

TRUSTS I.C.1., E.2.; II.B., D.; III.A., B., E.

ANALYSIS

- Legal Problems:
- (1) How can Settlor retain full control of trust assets and income?
 - (2) How can Settlor retain the right to make future additions to the trust?
 - (3) How can Settlor ensure that trust assets are used so that Wife is comfortably provided for after his death?
 - (4) How can Settlor ensure that assets remaining in the trust after Wife's death go to their children and give Wife the power to reward the children in her will?
 - (5) How can Settlor ensure that issue of a child who predeceases Wife will take the deceased child's share of trust principal?

DISCUSSION

Summary

A redlined draft of the trust instrument showing alterations that would better meet Settlor's stated goals follows:

SETTLOR TRUST AGREEMENT

1. I appoint ~~Bank~~ Settlor as trustee of the Settlor Trust and, upon Settlor's death, I appoint Bank as trustee.
2. I reserve the right to revoke this trust at any time, by deed or will.
3. I reserve the right to withdraw and add assets to this trust at any time, by deed or will.
24. I direct ~~Bank~~ the trustee to hold all assets listed on Schedule A in trust and to dispose of these assets as follows:
 - a. Bank Settlor, as trustee, shall pay all trust income to Settlor during Settlor's lifetime.
 - b. After Settlor's death, Bank, as trustee, shall pay such trust income and principal to Wife in such amounts as Bank, in its sole discretion, deems appropriate as is necessary to comfortably provide for her support and maintenance.
 - c. Wife shall have the right to withdraw trust principal as is necessary to comfortably provide for her support and maintenance.
 - d. After Wife's death, Bank shall distribute all remaining trust assets to such one or more of Settlor's issue as Wife shall appoint by will. If Wife does

not exercise her power of appointment, Bank shall distribute all remaining trust assets equally among Settlor's surviving children, share and share alike, provided, however, that if any child of Settlor predeceases Wife leaving issue surviving, the share of the deceased child shall be paid to that child's issue.

35. Bank Settlor accepts and agrees to faithfully carry out the terms of this trust.
[Signatures, dates, and acknowledgments are omitted.]

SCHEDULE A

12,000 shares of XYZ Corporation common stock
\$150,000 (cash)

[NOTE: This new draft does not necessarily represent the best method of meeting Settlor's stated goals, but it does respond to the most obvious deficiencies in Attorney's draft.]

Point One (20–30%)

Because Settlor wants to retain full control of trust assets, he should retain a power of revocation. To give Settlor more control, he might also be given a right of withdrawal and be named sole trustee.

In some states an inter vivos trust is revocable unless the instrument expressly provides otherwise (*see* UNIF. TRUST CODE § 602(a)), but in most jurisdictions it is irrevocable unless the instrument expressly provides otherwise. Thus a well-drafted trust instrument should always expressly state whether it is revocable or irrevocable.

Here Settlor told Attorney: "I want to fully control trust assets . . . until I die." An irrevocable trust is incompatible with this aim. To ensure that Settlor has the power to revoke as part of a testamentary plan as well as during his lifetime, the revocation clause should expressly provide that it can be exercised by deed or will.

Additional control could be conferred upon Settlor through a retained right of withdrawal. This power would enable Settlor to withdraw assets from the trust without revoking it.

Finally, Settlor could be named sole trustee with Bank the successor trustee. This step would give Settlor complete control of the management and administration of the trust.

Point Two (10–15%)

Because Settlor contemplated the possibility of adding assets to the trust, the trust should have an additions clause.

As a general proposition, a trustee's duties cannot be unilaterally enlarged by the settlor after the trustee has accepted the office. *See* UNIF. TRUST CODE § 801 (providing that "[u]pon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes"). Thus a well-drafted trust instrument should contain an additions clause if the settlor contemplates enlarging the trustee's responsibilities by augmenting the trust with additional assets. (Even then, however, a trustee may be able to reject additions. *See, e.g.*, UNIF. TRUST CODE § 816.)

Point Three (20–30%)

Because Settlor wanted to ensure that Wife would be comfortably provided for, the trust instrument should require distribution in accordance with an ascertainable standard relating to Wife’s maintenance and support, and Wife should be granted a withdrawal power.

Settlor specified that he wanted Wife “to be comfortably provided for.” Granting the trustee discretionary power to distribute income and principal to Wife cannot ensure this result because a beneficiary cannot compel a trustee to distribute trust property not otherwise subject to a standard unless he or she can show an abuse of discretion. *See* UNIF. TRUST CODE § 504(d). An ascertainable standard, such as “comfortable maintenance and support,” sets bounds on the trustee’s discretion and would empower Wife to compel distributions from the trust if necessary.

To further ensure that Wife is comfortably provided for, she could be given a right to withdraw trust principal. Such a power could be unconditional or, as in the revised instrument, might be limited to withdrawals necessary to ensure her comfortable support.

[NOTE: Unconditional withdrawal powers are often limited to \$5,000 or five percent of trust principal in order to obtain tax advantages.]

Point Four (15–25%)

Because Settlor wanted to leave trust principal to his children and to enable Wife “to use trust assets as a way of rewarding, in her will, whichever children have been most helpful,” and also expressed a desire that the descendants of a deceased child should take by substitution, Wife should have been given a special testamentary power of appointment. This power should extend to issue, not just children, to enable Wife to appoint to more remote descendants.

Settlor expressed the desire that his children take remaining trust principal and that Wife have the right to reward their children in her will. He also expressed a desire to have a deceased child’s descendants take the deceased child’s share. To accomplish these goals, Wife should have been given a special testamentary power of appointment. Such a power would enable Wife to favor some children over others, as Settlor wants. But because the exercise of a special power is limited to the group selected by the donor of the power (here, Settlor), Wife could not appoint trust assets to individuals other than Settlor’s issue. The special power would both ensure that trust assets ultimately go to Settlor’s children or more remote descendants and give Wife control. Exercise of a power can also be restricted, as Settlor has specified, to testamentary bequests. No other drafting tool can fully meet all of Settlor’s goals. As drafted, Wife could appoint to a grandchild even if the grandchild’s parent was alive. This could be avoided, if Settlor desired, by providing: “After Wife’s death, Bank shall distribute all remaining trust assets to such one or more of the Settlor’s children and issue of deceased children as Wife”

[NOTE: The word “issue” gives Wife the power to appoint to children as well as more remote descendants. This allows Wife the power, consistent with Settlor’s intent, to give the property to the descendants of the deceased child. (*See* Point Five.)]

Point Five (10–20%)

Because Settlor wanted the issue of any deceased child to take his parent's share of trust assets, the trust instrument should have so specified.

Settlor stated that, "if Son dies before Wife, I'd want his share to go to Grandchild." Although Settlor did not specify that he would want surviving issue to take the shares of his other children, it's likely that he focused on Son because Son was the only child to have a child.

In many jurisdictions, the instrument drafted by Attorney will not accomplish the aim of ensuring that surviving issue take their deceased parents' shares. Many state anti-lapse statutes apply only to testamentary bequests, and the Settlor Trust was established during Settlor's lifetime. Thus the trust instrument should expressly state that issue take a deceased parent's share.

CORPORATIONS AND LIMITED LIABILITY COMPANIES I.; III.; V.D.

ANALYSIS

- Legal Problems:
- (1)(a) Can the members of an LLC maintain a direct action against the manager of the LLC for mismanagement of the LLC?
 - (1)(b) Can the members of an LLC maintain a derivative action against the manager of the LLC for mismanagement of the LLC?
 - (2) Were Art's actions a breach of his fiduciary duty of care as the manager of LLC?
 - (3) Can Peter pierce the veil of limited liability of LLC and hold any or all of its members liable for LLC's debt?

DISCUSSION

Summary

If Brett and Chad bring an action against Art for mismanagement of LLC, that action must be a derivative (not direct) action because the harm Brett and Chad suffered was derivative of the injury Art caused LLC. To bring a derivative action, Brett and Chad must comply with the procedural requirements set forth in the Uniform Limited Liability Company Act (ULLCA). These requirements typically mandate a demand upon the managing partner before initiating an action. However, here demand is likely to be excused because Art is unlikely to bring an action against himself.

If Brett and Chad bring a derivative action, they are likely to lose. Under the ULLCA, Art would be liable for a breach of the duty of care only if he acted in a grossly negligent or reckless manner. In jurisdictions that have not adopted the ULLCA, Art would be protected by the business judgment rule.

Most LLC statutes provide that neither members nor managers are personally liable for the debts of an LLC. Courts generally recognize the equitable concept of piercing the veil of limited liability of an LLC. However, the facts in this case do not seem to provide a basis for piercing, and Peter probably cannot recover from Art, Brett, or Chad.

Point One(a) (15–25%)

Members of an LLC cannot maintain a direct action against the manager of the LLC for mismanagement of the LLC.

Members of a manager-managed LLC do not have the right to maintain a direct action against the manager of the LLC when the alleged misconduct caused harm only to the LLC. *See Wright v. Herman*, 230 F.R.D. 1, 10 (2005) (overwhelming majority rule that a claim for an injury to a

corporate entity against a manager or officer must be brought derivatively). The operating agreement provides that Art manages LLC. Therefore, this is a manager-managed LLC. It does not matter that Art is also a member of LLC.

Here, the harms that Art caused—failing to manage the business profitably and failing to insure the business properly—were harms to the business and reputation of LLC, not harms directly to Brett and Chad. Because the harms were derivative, not direct, Brett and Chad may not bring a direct action against Art.

[NOTE: If Art breached a contractual obligation to Brett and Chad, they could maintain a direct action against Art. ULLCA § 410(a)(1) permits a member to sue the LLC or another member to enforce the member’s rights under the operating agreement. The facts do not suggest that any violation of the operating agreement occurred.]

Point One(b) (15–25%)

Members of an LLC can maintain a derivative action against the manager of the LLC for mismanagement of the LLC. Normally, members must make a demand on the manager to bring the action. Here, however, demand will likely be excused.

Members of an LLC can maintain a derivative action against the manager of the LLC for mismanagement of the LLC. In order to maintain such an action, members must normally first make a demand that the manager bring the action and allege in their complaint the efforts that they made to “secure initiation of the action by [the] . . . manager or the reasons for not making the effort.” ULLCA §1103. Here, however, it is likely that demand would be excused, as Art would have to agree to bring an action against himself. Obviously, this demand would be futile. Therefore, Brett and Chad probably could bring a derivative action without first making a demand on Art, although that action would likely fail. (*See* Point Two.)

Point Two (20–30%)

Simple negligence does not constitute a violation of a manager’s fiduciary duty of care to the LLC.

Under the ULLCA, managers (or members in a member-managed LLC) owe a duty of care to the LLC, but they are not liable for simple negligence. ULLCA § 409(c) provides that the duty of care consists of “refraining from engaging in grossly negligent conduct or reckless conduct, intentional misconduct, or a knowing violation of law.” Under this standard, the question would be whether Art’s failure to manage LLC profitably and to insure the business rose to the level of gross negligence or reckless conduct.

Some state statutes reject the gross negligence standard of the ULLCA and impose an ordinary negligence standard for evaluating breaches of an LLC manager’s duty of care. Where that is the case, however, the business judgment rule may be applied to protect LLC managers from liability for business decisions made in good faith. *See* Elizabeth Miller and Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations*, 30 DEL. J. CORP. L. 343, 366–68 (2005). *See also* Revised Uniform Limited Liability Company Act § 409(c) (2006) (adopting an ordinary

negligence standard but making an LLC manager's liability for breach of the duty of care subject to the business judgment rule).

Although the precise operation and content of the business judgment rule will vary from state to state, its impact is to shield managers from liability for business decisions. *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000). Under this rule, a court will not second-guess a manager's decision, even if the decision was a bad one, if the manager acted "on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

Under any of these tests, Art is unlikely to be held liable for the fact that LLC's business failed. The mere fact that LLC was unprofitable does not indicate that Art violated his duty of care. Many businesses operate unprofitably, and no facts suggest that Art was either grossly negligent (as required by the ULLCA) or even negligent in his general operation of LLC's business. In addition, in those jurisdictions that apply a negligence standard, Art would also have the protection of the business judgment rule, and there are no facts to suggest that Art behaved in a way that would take his decisions outside the scope of that rule.

On the other hand, Art is arguably liable for his failure to insure LLC. His failure to sign the insurance premium payment check was clearly negligent and could be characterized as grossly negligent. What's more, in a jurisdiction that imposed an ordinary negligence standard, the business judgment rule might not protect Art from liability for this sort of breach of the duty of care. Generally, the business judgment rule protects business managers from liability for their good faith business decisions; it does not protect them from liability for negligent failures to perform ministerial acts such as signing corporate checks.

[NOTE: An applicant may note that Art is subject to a duty to act in good faith. The ULLCA includes an obligation of good faith and fair dealing among the statutory duties of a manager. *See* §409(d). The facts, however, suggest that Art did act in good faith; thus, Brett and Chad could not maintain a claim for a breach of this duty.]

Point Three (30–40%)

To pierce the veil of an LLC and hold the members personally liable, a claimant must demonstrate either that the LLC was a mere instrumentality of the individual defendants or that there was a unity of interest and ownership between the LLC and the individual defendants. Here, it is unlikely that Peter can pierce the veil of LLC.

Ordinarily, members of an LLC are not liable for the debts, obligations, or liabilities of an LLC "solely by reason of being or acting as a member." ULLCA §303. However, either by statute, *see, e.g.*, Minn. Stat. § 322B.303(2), or by judicial decision, *see, e.g.*, *Kaycee Land & Livestock v. Flahive*, 46 P.3d 323 (Wy. 2002), most states to consider the issue have recognized the possibility of piercing the veil of limited liability of an LLC, under appropriate circumstances.

Courts that pierce the veil rely on various theories to do so. Two of the most prominent are the "mere instrumentality" and "unity of interest and ownership" theories. *See, e.g.*, *Litchfield Asset Mgmt. Corp. v. Howell*, 799 A.2d 298 (Conn. App. Ct. 2002).

Under the “mere instrumentality” test, Peter would have to show that (1) the members dominated the entity in such a way that LLC had no will of its own, (2) the members used that domination to commit a fraud or wrong, and (3) the control and wrongful action proximately caused the injury complained of.

Under the “unity of interest and ownership” test, Peter must demonstrate that there was such a unity of interest and ownership between the entity and the members that, in fact, LLC did not have an existence independent of the members and that failure to pierce through to the members would be unjust or inequitable.

Whereas a failure to follow formalities in the operation of the corporation is a factor in corporate veil piercing cases, it is less frequently relevant in LLC cases. This is because many LLC statutes, including the Uniform Limited Liability Company Act, provide explicitly that “the failure of a limited liability company to observe the usual company formalities . . . is not a ground for imposing personal liability on the members or managers.” ULLCA § 303(b). However, in the absence of a statutory bar, some courts will cite a failure to follow formalities in the LLC context as part of the rationale for piercing the LLC veil. *See, e.g., Bonner v. Brunson*, 585 S.E.2d 917 (Ga. Ct. App. 2003).

The decision to pierce the LLC veil is highly fact dependent. The factors that are most likely to lead to an affirmative decision to pierce the veil are facts suggesting that the LLC was simply the “alter ego” of the owners, evidence of serious undercapitalization of the company, or a lack of substantive separation between the business of the company and the personal business of the owners. *See Rapp, Preserving LLC Veil Piercing: A Response to Bainbridge*, 31 IOWA J. CORP. L. 1063 (2006).

Under any of these tests, it seems probable that neither Brett nor Chad could be held liable for the liabilities of LLC as they had no authority to act on behalf of LLC. As to the “mere instrumentality” test, neither Brett nor Chad dominated LLC in a way that it became a “mere instrumentality.” As to the “unity of interest” test, there was not, in any sense, a unity of interest and ownership between Brett and Chad and LLC.

The case against Art may appear stronger, because Art may have dominated LLC, but it is still not likely that Peter could prevail. Under the mere instrumentality test, even if Peter could show that Art dominated LLC, it is not likely that Peter would be able to prove that Art used his domination to commit a fraud or wrong. Although Art sent in the insurance premium without signing the check, this negligence is not sufficiently wrongful to justify piercing the limited liability shield. Under the unity test, Peter could not show that Art had a “unity of interest in ownership with LLC” because Chad and Brett had substantial interests in LLC. Although it might be argued that LLC was undercapitalized because it could not meet its obligations, its initial capitalization was substantial (\$100,000), and there are no facts to suggest that amount would not have been sufficient capitalization for a business of this sort had it been run more effectively (and had Art purchased insurance as intended).

NOTES